Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; DAVID DIGUGLIELMO, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GRATERFORD; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW
Petitioners

v.

HUBERT L. MICHAEL
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether after an exhaustive examination by the district court, a capital defendant has been determined to be competent and has waived his right to federal *habeas corpus* review, may a court of appeals entertain an appeal filed in his name, and over his objection, by discharged counsel?

2. Should a certificate of appealability be issued pursuant to 28 U.S.C. § 2253(c) when a state prisoner is not an aggrieved party, having received all of the relief he sought in the District Court and he otherwise has no standing to appeal?

PARTIES TO THE PROCEEDING

The petitioners are Martin Horn, David Diguglielmo and Joseph P. Mazurkiewicz, Pennsylvania custodial officials. Respondent is Hubert L. Michael, a Pennsylvania prisoner sentenced to death.

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STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on August 18, 2006 and is interlocutory. This petition is being filed within ninety days thereafter. 28 U.S.C. § 2101(e). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST., Art. III § 2, cl. 1.

Title 28 of the United States code provides in relevant part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained or arises our of process issued by a State court;
> >
> > * * * * *
> >
> > (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> >
> > (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issued satisfy the showing required by paragraph (2).

28 U.S.C. §2253(a),(c)(1),(2) and (3).

Title 21 of the United States Code formerly provided in relevant part that:

> [i]n any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to the appointment of one or more attorneys . . . .

21 U.S.C. § 848(q)(4)(B), *repealed by* Terrorist Death Penalty Enhancement Act of 2005, Pub.L. No. 109-177, tit II, subtit. B, § 222(c), 120 Stat.192, 232 (2006)

STATEMENT OF THE CASE

On October 11, 1994, Hubert L, Michael pled guilty in the York County Court of Common Pleas to the first degree murder and kidnapping of 16-year-old Trista Eng. As he was driving along a highway in York County, Pennsylvania, on July 12, 1993, Michael encountered Eng walking to her summer job, offered her a ride, and then drove her to a remote wooded area where he forced her out of his car, shot her with a .44 magnum handgun and hid her body. Subsequently, Michael waived his right to be sentenced by a jury and stipulated both to the existence of two aggravating circumstances—that he had committed the killing in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6) and that he had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711 (d)(9)—and that there were no mitigating circumstances. The trial court, having concluded that aggravating circumstances outweighed mitigating circumstances, imposed the death penalty. The Pennsylvania Supreme Court affirmed the conviction and death sentence, *Commonwealth v. Michael*, 544 Pa. 105, 674 A.2d 1044 (1996), and an execution warrant was signed by the Governor in July 1996 setting Michael's execution for the following month. Pet. App. 4a-5a, 9b.

1. Approximately one week before the date set for Michael's execution, attorneys from the Defender Association of Philadelphia, Capital Habeas Corpus Unit ("Defender Association") moved for a stay of execution and their appointment as counsel for Michael in the United States District Court for the Middle District of Pennsylvania. That court granted a stay and appointed the Defender Association to represent

Michael.[1] On learning this, Michael wrote to the court dismissing the Defender Association and requesting that the Governor re-issue an execution warrant "as soon as possible." The Defender Association claimed that Michael was not competent and, after complying with the court's direction that they confer with Michael, submitted the declaration of one of its attorneys that described Michael using terms such as "incoherent," "catatonic," and "completely uncommunicative, "and also represented that Michael had authorized his attorneys to seek state collateral review of his convictions. The District Court stayed the federal *habeas* proceedings to permit an application for relief to be filed under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* Pet. App. 5a, 12b.

The York County Court of Common Pleas which heard Michael's PCRA application conducted evidentiary hearings related to claims that Michael was not competent to plead guilty and to waive the presentation of evidence of mitigating circumstances and denied relief on all claims. The Defender Association filed an appeal to the Pennsylvania Supreme Court from that ruling, but while that appeal was pending, Michael filed an affidavit indicating that he did not want to proceed with the appeal. The Pennsylvania Supreme Court directed a limited remand to the court of common pleas for the purpose of determining whether Michael was competent to discontinue the appeal of the PCRA decision. *Commonwealth v. Michael*, 552 Pa. 40, 713 A.2d 96 (1998). To this end, the court of common pleas heard expert testimony and conducted a colloquy with Michael. Based on the same, it found Michael competent and the matter returned to the state supreme court. Pet. App. 6a.

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[1] The District Court also granted Michael leave to proceed *in forma pauperis* but no *habeas* petition was filed at that time.

Before the state supreme court reviewed the competency ruling, Michael filed another affidavit asking the court to "decide the merits of his PCRA appeal quickly," which the state supreme court interpreted as repudiating his earlier request to withdraw his appeal. The Pennsylvania Supreme Court proceeded to address the merits of the claims raised in the appeal and found no error.[2] Specifically, it determined that trial counsel was not ineffective for failing to investigate and present evidence of Michael's purported incompetence and that in not presenting mitigating evidence counsel was fulfilling his ethical duty to comply with is client's instructions. *Commonwealth v. Michael*, 562 Pa. 356, 755 A.2d 1274 (2001). When the Defender Association sought reargument, Michael wrote to the court saying that it was not acting on his behalf. Reargument was denied. *Id.*; Pet. App. 7a, 19b-20b.

2. After state court collateral review was completed, the Defender Association sought to reactivate the federal *habeas* matter that had been stayed by the District Court and asked for leave to file a *habeas* petition within 120 days.[3] The respondent state officials ("the Commonwealth") moved to have the Defender Association replaced as counsel, based on Michael's correspondence indicating he wanted them removed and the apparent conflict of interest that existed. Pet. App. 21b.

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[2] Michael would later tell the District Court that he took this action because he thought it would expedite the termination of the proceedings. *See* Pet. App. 6a n.2.

[3] During the pendency of his PCRA case in state court, Michael wrote three times—on April 15, 1997, on July 9, 1997 and on December 26, 2000—to the District Court advising that he wanted the court to refrain from staying his execution. Pet. App. 7a, 20b.

The District Court did not immediately rule on that request.[4] Instead, some nine months later on September 20, 2001, it issued a memorandum and order ruling that the presumption of correctness that ordinarily attaches to the fact findings of a state court—in this instance, the fact findings related to Michael's competence—did not apply here because the Pennsylvania Supreme Court did not review the factual determinations made by the PCRA when the case was remanded for the limited purpose of assessing Michael's competency. It also rejected a request by the Defender Association that Michael be moved to a federal facility for a competency evaluation, and appointed an expert. Robert M. Wettstein, M.D., a board-certified psychiatrist to evaluate Michael, and to determine, *inter alia*, whether Michael was capable of understanding his legal position and the options he had. Dr. Wettstein forwarded a comprehensive report to the court on May 29, 2002, and it reflected that, after reviewing a wide variety of Michael's records and tests and conducting two days of interviews with him, Dr. Wettstein had concluded "with reasonable psychiatric certainty, that Mr. Michael is not suffering from any mental disease, disorder or defect, including any "cognitive dysfunction," which substantially adversely affects his ability to make a decision with regard to pursuing his legal appeals, and that Mr. Michael has the ability to consult with his attorneys with a reasonable degree of understanding, and a rational as well as factual understanding of the proceedings against him." Pet. App. 32b.

In the wake of that report, the District Court appointed an attorney, Joseph M. Cosgrove, Esq., to represent Michael's interests and scheduled a hearing for September 26, 2002. It began that proceeding by

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[4] The Defender Association proceeded to file a petition in Michael's name in June 2001 pursuant to 28 U S.C. §2254.

conducting an extensive colloquy and Michael's responses to the court's questions, the District Court said, "revealed a rational understanding of each inquiry." It received evidence, including the testimony of Dr. Wettstein concerning his evaluation of Michael, which reiterated what he had said in his report to the court. The Defender Association was allowed to participate in these proceedings and was afforded the opportunity to cross-examine Dr. Wettstein at length. In its decision on March 10, 2004, the District Court concluded "without hesitation" that Michael was competent and had made a knowing, rational and voluntary decision to terminate his federal litigation. It dismissed the Defender Association and Cosgrove as counsel for Michael; granted Michael's request to dismiss the *habeas* petition filed in this case; and vacated the order staying Michael's execution. Pet. App. 50b.[5]

3. Though it had been discharged as counsel and no stay of the District Court's order had been sought or obtained, the Defender Association filed a notice of appeal to the Third Circuit in Michael's name. It made no application to either the District Court or the Court of Appeals for a certificate of appealability (COA) as required by 28 U.S.C. § 2253(c). On April 14, 2004, Michael wrote to the court saying he did not wish the appeal to proceed. The Commonwealth moved to dismiss the appeal and on May 4, 2004, the Court of Appeals conditionally granted that motion. The court, however, suspended entry of the order for ten days "to afford Michael an opportunity to indicate his desire to proceed with federal review of his case." Pet. App. 10a.

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[5] The District Court noted that during the time this matter was before it following state court review, Michael wrote a total of seven times asking the court to end the proceedings. Pet. App. 16a.

The next day, Michael wrote to the court and said that he wanted to proceed with his appeal and to have new counsel appointed. The court deferred ruling on the motion to dismiss and scheduled oral argument before a panel, (Nygaard, Chertoff, Greenberg, JJ.), for June 22, 2004. Five days prior to the scheduled argument, Dr. Wettstein wrote to the court of appeals indicating that he had been told hat Michael no longer wants to be executed and that this recent change of mind, in his view, needed further exploration and evaluation. Pet. App. 10a.

After oral argument, the court did not rule on the Commonwealth' motion to dismiss, but instead granted a COA on the question of "whether the District Court violated 21 U.S.C. § 848(q)(4)(B), by dismissing counsel for Hubert Michael and, if the District Court so erred, whether this error was harmless . . . ," an issue raised for the first time during the June 22nd oral argument.

Almost six months later, on November 26, 2004, the Court of Appeals received a third letter from Michael that it construed as a *pro se* motion to withdraw his appeal and to dismiss Cosgrove as his attorney. The court directed the parties to brief the same and Cosgrove filed a response telling the court that Michael was "anything but steadfast in his desire to terminate this appeal or my representation of him." On January 5, 2005, the panel entered an order that informed Michael as follows:

> If you dismiss this appeal you will waive all right to pursue this appeal. As a result you may also be denied any further review of your conviction and sentence by this or any other court. Additionally, in the future, you may be legally prohibited from filing a new habeas petition for other petition for review. *In short, your dismissal of this appeal may terminate any*

further judicial review of your conviction and sentence.

Pet. App. 11a (emphasis in original).

Michael wrote again on February 22, 2005 saying he had received and understood the Court's January 5th order and the consequences of his waiver. He explained that, after consultation with counsel, he nevertheless wanted to withdraw his appeal. The next day, Cosgrove and Michael asked the court to defer acting on Michael's letter for two weeks to allow them to meet again, a request the court granted. On March 18, 2005, Cosgrove filed a document entitled "Report of Counsel" stating that a litigation plan was being developed for Michael and asking the court to rule on the issue as to which the COA had been granted. Pet. App. 12a. Ten days later, Michael wrote to the court indicating his wish to dismiss his appeal and wrote again on May 23, 2005, reiterating that request.

4. The Court of Appeals did not rule on the Commonwealth's motion to dismiss but instead a divided panel of that court, (Ambro, Nygaard, Greenberg, JJ.), issued the following order on June 2, 2005:

> Inasmuch as the petitioner is represented by counsel, the pro se letters to withdraw the appeal are denied. The District Court's order entered March 10, 2004, is vacated to the extent that it dismissed Joseph M. Cosgrove, Esq., as counsel granted Michaels' motion to dismiss his habeas corpus petition and vacated the stay of execution. The matter is remanded for further proceedings to determine whether habeas corpus relief is warranted, We express no opinion on such questions as whether Michael's claims are exhausted, procedurally barred or meritorious. In the event that Michael

> files any further *pro se* motions to dismiss his petition, we urge the District Court to deny them summarily. *See Smith v. Armatrout*, 865 F.2d 1515 (8th Cir. 1988); *St. Pierre v. Cowan*, 217 F.3d 939, 949-950 (7th Cir. 2000).

Pet. App. 12a-13a. Judge Greenberg dissented from that order saying that he would have dismissed the appeal. The District Court, he pointed out, had found Michael competent, and Michael had made his desire to end all proceedings absolutely clear. Pet. App. 24a-25a, 31a; *Michael v. Horn*, 414 F.3d 456, 460 (3d Cir. 2005 (Greenberg, J., dissenting).

The Commonwealth moved for panel rehearing or rehearing *en banc*. The Court of Appeals denied its petition on July 7, 2005 and issued the mandate the next day. Judge Greenberg, a member of the divided panel that issued the order, dissented. *Id. Sua sponte* the panel recalled the mandate on August 10, 2005, and granted panel hearing, saying that its June 2nd order had "le[ft] the District Court with little guidance in this complicated case as to our reasons for remanding the case for further proceedings and, indeed, [did] not identify what error (if any) the District Court committed in connection with the decision appealed." Pet. App. 13a (citation omitted).

On September 19, 2005, Michael wrote again to tell the court he wanted no further appeals. The court took no action but scheduled another oral argument for January 12, 2006. Dr. Wettstein sent a letter to the court saying that because Michael "has again vacillated," further evaluation is warranted. In the wake of that communication Michael wrote to the court two more times: on January 9, 2006, indicating that he wanted Cosgrove to remain as his counsel for the duration of the matter; and on February 6, reiterating that he wanted no more appeals and saying that the court should not misconstrue his previous letter about

Cosgrove. "Yes," he told the court, "I would like Joseph Cosgrove to continue to represent me for as long as I am before any court regarding any criminal matter .... However, I ask for no further appeals regarding my sentence of death." Pet. App. 15a.

On August 18, 2006, the Court of Appeals issued an order remanding this matter to the District Court for another competency hearing. It did so, it said, because the letters it received from Dr. Wettstein, caused it to have doubts about Michael's competency and his ability to withdraw his appeal. The court's order notes that "if Michael is again found competent, he will have one last opportunity to have his appeal heard. If there is such a determination, the District Court is to ask Michael if he wishes to appeal and if he indicates he does not the Court of Appeals says it will abide by that answer and dismiss his appeal." Pet. App. 20a-21a.

This petition has ensued.

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals conflicts with the this Court's rulings in *Whitmore v. Arkansas*, 495 U.S. 149 (1990) and *Demosthenes v. Baal*, 495 U.S. 731 (1990), which enforce a capital defendant's right to make decisions about whether or not to pursue review of his criminal conviction and sentence as well as with the decisions of other Circuits that faithfully applying those teachings. The Court of Appeals also erroneously exercised jurisdiction when it issued a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c), even though the defendant was not an aggrieved party, and when it exceeded the boundaries of the certificate it issued.

I. There is a Conflict in the Circuits As to the Proper Application of *Whitmore* and *Baal*.

In *Jones v. Barnes*, 463 U.S. 745 (1983) this Court specifically acknowledged the longstanding principle that a criminal defendant "has the ultimate authority to make certain fundamental decision regarding [his] case, as to whether to plead guilty, waive a jury, testify on his or her own behalf or take an appeal . . . ." *Id.* at 751 (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977)(Burger, C.J., concurring) and ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980)).[6] This Court has repeatedly enforced those principles in cases involving the imposition of a death sentence, upholding a defendant's right to choose to forgo review of his conviction and sentence.

In *Gilmore v. Utah*, 429 U.S. 1012 (1976), the Court determined that, based on the findings of the state courts that the defendant was competent and had made a knowing and intelligent waiver of his rights to any federal review, it would be improper to allow another individual to attempt to pursue such review. It rejected the attempt of the defendant's mother, who sought to proceed as his "next friend," concluding that there was no basis for her to participate in this fashion as the factual findings precluded the appointment of a "next friend," and therefore she had no standing to litigate any claims on her son's behalf. The Court held it was without jurisdiction to entertain her "next friend" application since ART. III of the Constitution only permits the Court to hear "cases and controversies." Because there was no dispute between the defendant and the State of Utah, the court had no jurisdiction to entertain any claim on the defendant's behalf. *Id.* at 439.

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[6] Current ABA Standards likewise reflect this. *See* ABA Standards for Criminal Justice 4-5.2, 21-2.2 (3d ed. 1993).

Again, more recently, in *Whitmore v. Arkansas*, *Demosthenes v. Baal*, the court found no basis for allowing a third party-instigated review of a capital defendant's case where the defendant had been determined to be competent and had made a knowingly and intelligent waiver of his rights. In both cases, the Court cautioned against a court entertaining a matter without having first determined that jurisdictional prerequisites are satisfied, including the requirements imposed by ART. III. *Whitmore*, 495 U.S. at 154-155 (court must make sure the "cases and controversies" requirement of ART. III is met before addressing the merits of claims); *Baal*, 495 U.S. at 737 (even in "last minute" situations courts "must make certain that an adequate basis exists for the exercise of federal power").

Despite the clear instructions that those cases provide, the Court of Appeals here did not adhere to them. In the wake of the District Court's March 10, 2004 order granting Michael's request to terminate federal review and to discharge his attorneys, the Court of Appeals was obligated under these cases to dismiss the notice of appeal filed in Michael's name and over his objection by the Defender Association, an entity that no longer had any standing to act on Michael's behalf, having been discharged as his counsel. Given Michael's repudiation of that filing, the court was also obliged to determine there was no "case or controversy" that might invest it with jurisdiction. To borrow from *Gilmore*, there was no dispute between Michael and the Commonwealth.

That the Court of Appeals continued to act in the face of this, and to defer a ruling on the Commonwealth's motion for what is now approaching three years, cannot be reconciled with the teachings of this trilogy of cases. Its latest order, returning this case to the District Court for yet another evaluation of Michael's competence, is the by-product of an improper exercise of jurisdiction and a failure to give full effect to

the principles of waiver underscored in *Jones v. Barnes*. The Court of Appeals has, as Judge Greenberg has previously observed, "put Michael in the . . . position of being an involuntary federal litigant." *Michael v. Horn*, 414 F.3d at 457 (Greenberg, J., dissenting).

The Court of Appeals' handling of this matter conflicts with the rulings of other Circuits that have given full effect to the teachings of *Gilmore*, *Whitmore*, and *Baal*. and have refused to permit litigation to proceed where a competent defendant has made a legally valid waiver. *See West v. Bell*, 242 F.3d 338 (6th Cir.. 2001)(dismissing attempt by attorney to seek *habeas* review on behalf of capital defendant despite client's instructions not to pursue the same); *Brewer v. Lewis*, 989 F.2d 1021 (9th Cir. 1993); *Fleming ex rel. Clark v. LeMaster*, 28 Fed. Appx. 797 (10th Cir. 2001)(rejecting attempt by putative "next friend" to pursue review of capital defendant's case in wake of defendant's decision to abandon all challenges to conviction and sentence); *Sanchez-Velasco v. Sec'y of the Dep't of Corrs.* 287 F.3d 1015 (11th Cir. 2002)(affirming dismissal of *habeas* petition filed by attorney without knowledge of capital defendant who did not want it).[7] This Court's guidance is necessary to resolve the conflict that had ensued from Third Circuit's deviation from the straightforward approach dictated by *Gilmore*, *Whitmore* and *Baal*.

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[7] There appears to be some conflict in Ninth Circuit jurisprudence in this area. *Compare Brewer*, *supra*, with *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006)(where the court held that, in capital cases, the seriousness of the penalty fetters the ability of a court to enforce the usual principles of waiver and found, notwithstanding the ruling in *Gilmore*, that there is an Eighth Amendment-based obligation to ensure that there has been a full adjudication of a defendant's conviction and sentence.)

II. The Court of Appeals Erred in Issuing COA and Therefore Lacked Jurisdiction to Entertain Any Appeal From the District Court's Disposition of this Matter.

Apart from the Court of Appeals' failure to proceed as *Gilmore*, *Whitmore* and *Baal* require, it erred additionally, in two separate ways, with respect to its issuance of a COA under 28 U.S.C. § 2253(c). Federal *habeas* law, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), requires that a *habeas* petitioner must seek a COA before any appeal may be entertained by a court of appeals. *Slack v. McDaniel*, 529 U.S. 473, 480 (2000). Issuance of a COA is jurisdictional and only those issues as to which a COA is issued may be pursued in an appeal by the *habeas* petitioner. *Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003).

1. The first problem with the Court of Appeals' issuance of a COA in this case was that it failed to appreciate that Michael was not an aggrieved party as to the issue it identified, or any other issue for that matter. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). He had received all of the relief he wanted below, including the dismissal of his counsel. Michael otherwise had no standing to take an appeal, as there was no longer any case or controversy that met the requirements of ART. III. Once again, at the conclusion of the litigation in the District Court, Michael had no dispute with anyone. *See Gilmore, supra.* He had received everything he asked for. The Court of Appeals' issuance of a COA was therefore improper and should be corrected by this Court.

The Court of Appeals was apparently proceeding on a belief that it had some generic or freestanding authority to take up this issue regardless. That idea is seriously flawed. First, nothing in the provisions of this former statute or any decisional law interpreting it

supports that notion. Second, the plain language of the statute only refers to an entitlement to counsel in circumstances where a *habeas* petitioner is challenging his conviction and/sentence. *See* 21 U.S.C. § 848 (q)((4)(B)(repealed)(providing that an indigent defendant is entitled to the appointment of counsel "in any post conviction proceeding under section 2254 or 2255 of Title 28, *seeking to vacate or set aside a death sentence*" (emphasis added). There was no such proceeding involving Michael after the District Court's ruling. Any question about appointment of counsel under this statute was necessarily subsumed in the District Court's ruling allowing him to terminate federal *habeas* review—a ruling that Michael was *not* challenging.

The net effect of this improper issuance has been to allow this matter to pend—unjustifiably—in the Court of Appeals and to guarantee even more delay in the future as the consequence of its order remanding for further evaluation. This seriously-mistaken exercise of jurisdiction bears correction by this Court.

2. The second problem is, as Judge Greenberg has pointed out, that the court has not confined it handling of this matter to the question encompassed by the COA but has instead expanded it. *See Michael v. Horn*, 414 F.3d at 462-463 (Greenberg, J., dissenting).[8] Over the nearly three years this case has been pending, the court has not proceeded as though the scope of its review was limited to only the comparatively narrow issue identified in the COA.

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[8] Judge Greenberg's observation was made relative to the initial order issued by the panel on June 2, 2005, that vacated the District Court's dismissal of Michael's *habeas* case and discharged counsel and order the District Court to resume litigation of the petition filed by the Defenders over Michael's objection.

Though that order about which Judge Greenberg spoke in his dissent was subsequently vacated when the Court of Appeals recalled its mandate, and was replaced with the order of August 18, 2006, the more recent order nevertheless still goes further than the issue listed in the COA, directing the District Court to reevaluate Michael's competence. The court did this based on the correspondence of Dr. Wettstein which supplies no clear picture of what he was told or by whom prior to proffering an opinion that additional evaluation was needed. This highly irregular approach taken by the Court of Appeals not only runs counter to the traditional principles which figure in appellate review, *e.g.*, that a lower court's findings will not be disturbed unless there is a showing that there are clearly erroneous, *see Anderson v. City of Bessemer*, 570 U.S. 564 (1985), but oversteps the stated boundaries of its jurisdiction under the COA it issued. For this further reason, review—and correction—by this Court is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATE: November 16, 2006

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-9002

HUBERT L. MICHAEL,

Appellant

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; *DAVID DIGUGLIELMO, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview.

* (Amended - See Clerk's Order dated 1/6/05)

Appeal from the United States District Court
For the Middle District of Pennsyvlania
(D.C. Civil Action no. 96-cv-01554)
District Judge: Honorable Thomas I. Vanaskie

Argued January 12, 2006

Before: AMBRO, GREENBERG
And NYBAARD, Circuit Judges.

(Filed August 18, 2006)

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OPINION OF THE COURT

AMBRO, Circuit Judge:

After finding Hubert Michael competent to terminate his *habeas corpus* petition in this death-penalty case, the District Court dismissed that petition. The dismissal was appealed, purportedly on Michael's behalf. He later vacillated on his desire to dismiss this appeal. We hold that the presumption of continuing competency does not apply here because the foundational expert for the District Court's competency finding has suggested a new evaluation. We therefore remand to the District Court for another competency finding.

I. Factual Background and Procedural History

A. Michael's homicide conviction and resulting death sentence

Hubert Michael's story is a long and convoluted one, so we present only the facts most relevant to our decision. We draw many of these facts directly from the District Court's opinion in *Michael v. Horn*, No. 3:CV-96-1554, 2004 WL 438678 (M.D.Pa. Mar.10, 2004), which in turn drew many of its facts from the Pennsylvania Supreme Court's opinion affirming Michael's death sentence, *Commonwealth v. Michael*, 674 A.2d 1044 (1996).

On July 12, 1993, Michael pulled up alongside 16-year-old Trista Eng, who was walking to her summer job at a Hardee's restaurant, and offered to drive her to work. She got into the car, and Michael drove to the State Game Lands in York County,

Pennsylvania. He forced Eng out of the vehicle, shot her three times with a .44 magnum handgun, and concealed her body.

In late August 1993, Michael was charged with first-degree murder. In September 1993, he was transferred to the medical housing area of the Lancaster County Prison for "closer observation" because he fell down the stairs in a possible suicide attempt (though Michael has denied that he was trying to kill himself). In November 1993, Michael assumed the identity of an inmate who was about to be released, and he escaped from prison. In the spring of 1994, he was apprehended in New Orleans and returned to Pennsylvania.

In October 1994, jury selection on the murder charge began in the Berks County, Pennsylvania, Court of Common Pleas. Michael pled guilty to first-degree murder and kidnapping. He tried to withdraw that plea six days later, but the Court denied his plea-withdrawal request.

In March 1995, Michael waived his right to be sentenced by a jury. He also stipulated to the existence of the two aggravating circumstances alleged by the Commonwealth (killing during the perpetration of a felony and a significant history of felony convictions), and he stipulated that there were no mitigating circumstances. After an extensive colloquy, the Court accepted Michael's waiver of a right to a jury sentence, found that the aggravating circumstances outweighed the mitigating circumstances, and imposed the death penalty.

The Pennsylvania Supreme Court undertook an independent review of the record and affirmed the conviction and sentence. *Michael*, 674 A.2d at 1048. In July 1996, Governor Thomas Ridge signed an

execution warrant, and Michael's execution was scheduled for August 1996.

B. The District Court's stay of Michael's execution

Approximately one week before the scheduled execution date, the Defender Association of Philadelphia, Capital Habeas Corpus Unit, moved for a stay of execution and an appointment of counsel in the District Court for The Middle District of Pennsylvania. That Court granted the stay and appointed the Defender Association as Michael's counsel. Michael then wrote a letter dismissing the Defender Association from acting as his counsel and requesting that Governor Ridge re-sign his execution warrant "as soon as possible." *Michael*, 2004 WL 438678, at *4.

In response, the Defender Association took the position that Michael was not competent. The District Court directed the Defender Association to confer with Michael. Following that conference, attorney Billy Nolas submitted a declaration describing Michael as "'agitated, incoherent, irrational, sad, unable to control his varying emotions, and ultimately ... catatonic and completely uncommunicative.'" *Id.* at *5. The declaration also indicated that Michael had authorized Nolas to litigate his Pennsylvania Post Conviction Relief Act[1] (PCRA) proceedings. The District Court then stayed the federal *habeas* proceedings so that Michael's PCRA claims could be litigated. Our Court affirmed that stay by judgment order in June 1997.

C. Michael's PCRA Proceedings

As part of the PCRA proceedings, the Court of Common Pleas of York County conducted evidentiary

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[1] 42 Pa. Cons.Stat. Ann. § § 9541-9546.

hearings concerning Michael's competence to plead guilty and to waive the presentation of mitigating circumstances. The Commonwealth trial court denied relief on all claims, and Michael, represented by the Defender Association, appealed to the Pennsylvania Supreme Court.

While the appeal was pending, Michael filed an affidavit indicating that he did not wish the appeal to proceed. The Pennsylvania Supreme Court remanded the matter to the trial court to determine whether Michael was competent to discontinue the PCRA appeal. The Court of Common Pleas heard expert testimony and engaged in a colloquy with Michael. It found Michael competent, and the case returned to the Pennsylvania Supreme Court.

Before the Supreme Court could review the Court of Common Pleas's competency finding, Michael filed a new affidavit asking the Supreme Court to "decide the merits of his PCRA appeal quickly, essentially repudiating his request to withdraw the appeal." *Commonwealth v. Michael*, 562 Pa. 356, 755 A.2d 1274, 1276 (2000).[2] The Court therefore addressed the merits of the underlying PCRA appeal, concluding that Michael's trial counsel had not been concluding that Michael's trial counsel had not been ineffective in failing to investigate and present indicia of his alleged incompetency. *Id.* at 1279-80. It also held that Michael's claims pertaining to the failure to present mitigating evidence could not succeed, because

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[2] Michael indicated in the District Court that he had filed the new affidavit "to speed the processing of his case because[,] 'regardless if [he] did that or not[, the attorneys representing him] were still going to try to push that through.' " *Michael v. Horn*, 414 F.3d 456, 2005 WL 1606069, at *1 n. 3 (3d Cir. July 7, 2005) (Greenberg, J., dissenting).

counsel was fulfilling an ethical duty to comply with Michael's directions. *Id.*

Reargument was sought, but Michael sent a letter to the Pennsylvania Supreme Court claiming that the Defender Association was not acting on his behalf. The Court denied reargument.

D. District Court proceedings after Michael's PCRA litigation

1. District Court proceedings leading up to the dismissal order

Though the District Court stayed federal litigation pending the outcome of the PCRA proceedings, Michael wrote to the Court on three occasions (April 15, 1997; July 9, 1997; and December 26, 2000) to express his wish that the Court refrain from staying his execution.

In September 2001, the Court ruled that the presumption of correctness ordinarily attaching to state-court competency determinations[3] should not be applied because the PCRA court's competency determination was not reviewed by the Pennsylvania Supreme Court. The District Court accordingly appointed Dr. Robert Wettstein, a board-certified psychiatrist and clinical professor, to determine "'(1) whether Mr. Michael suffer[ed] from a mental disease, disorder or defect; (2) whether a mental disease, disorder or defect prevent[ed][him] from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder or defect prevent [ed][him] from making a rational choice among his options.' " *Michael*, 2004 WL 438678, at *10. *Accord*

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[3] *See Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (*per curiam*).

Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir.2000) (*per curiam*). The Court also requested that Dr. Wettstein consider whether Michael had sufficient ability to consult with his attorney with a reasonable degree of rational understanding and the ability to understand legal proceedings.

In June 2001, though the competency issues had not been resolved, the Defender Association filed a 146-page *habeas* petition.[4] In May 2002, Dr. Wettstein submitted his report, which was based on his review of the PCRA record, York County Prison records, state prison records, Michael's letters to the District Court, Michael's school records, an affidavit from Michael's sister, transcripts of an interview with Michael's brother, reports prepared by doctors who had testified at Michael's PCRA hearings, results of tests that Dr. Wettstein had personally administered, and eight hours of interviews with Michael. In the report Dr. Wettstein concluded, "with reasonable psychiatric certainty," that Michael (1) was not suffering from any mental disease, disorder, or defect that substantially and adversely affected his ability to make a decision with regard to pursuing his appeals and (2) had the ability to understand the legal proceedings and to consult with his attorneys with a reasonable degree of understanding. *Michael*, 2004 WL 438678, at *10.

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[4] The petition raised significant challenges to Michael's sentence. It claimed ineffective assistance of counsel in, *inter alia*, (1) failing to investigate and present Michael's incompetency, (2) stipulating to the existence of aggravating circumstances, (3) stipulating falsely that there were no mitigating circumstances, and (4) causing Michael to enter a guilty plea. The petition also claimed (5) that the death penalty was unconstitutional and that the trial court improperly (6) allowed Michael to plead guilty, (7) denied the requests to withdraw his guilty plea, and (8) denied his requests for different counsel.

In July 2002, the District Court appointed Joseph Cosgrove, Esq., to represent Michael, and it scheduled an evidentiary hearing on Dr. Wettstein's report. At the September 2002 hearing, the Court's colloquy with Michael revealed-in the words of the District Court-"a rational understanding of each inquiry" and his desire to terminate the proceeding. *Id.* at *11.

2. The District Court's dismissal of the habeas petition

The District Court relied heavily on Dr. Wettstein's report. *Id.* at *16 ("Dr. Wettstein's report and testimony afford an ample foundation for a conclusion that Mr. Michael 'has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation ....' " (omission in original)); *see also id.* at *13-16 (discussing Dr. Wettstein's report and conclusions). The Court accepted Dr. Wettstein's conclusions and went on to find that Michael's decisions were "knowing, rational and voluntary." *Id.* at *20. It explained that Michael's decision to end his legal proceedings had been "consistently repeated to this Court over a number of years. It is thus not the product of uncontrollable impulsivity." *Id.*

On March 10, 2004, the Court dismissed Michael's *habeas* petition and dismissed all of Michael's counsel, including the Defender Association and Cosgrove. *Id.* at *24.

E. Proceedings in our Court

Following the dismissal of Michael's *habeas* petition, the Defender Association filed a notice of appeal from that dismissal to our Court. Almost immediately began Michael's vacillation as to whether

he wished to withdraw this appeal. His first letter to our Court-on April 14, 2004-indicated that he did not wish the appeal to proceed.

The Commonwealth moved for dismissal. On May 4, 2004, our Court conditionally granted this motion to dismiss, but the entry of the order was suspended for ten days to afford Michael an opportunity to indicate his desire to proceed with federal review of his case. Michael filed his second letter the next day-May 5-indicating instead his desire to proceed with this appeal and his wish to have new counsel appointed in his appeal. We deferred ruling on the motion to dismiss and scheduled oral argument for June 2004.

Five days before the oral argument, we received a letter from Dr. Wettstein. It read in part as follows:

> I have...been informed that Mr. Michael represented to the Court of Appeals that he no longer wishes to be executed, but wants the legal issues in his case presented with the assistance of new legal counsel. Based upon his recent change of mind, it is my psychiatric opinion that Mr. Michael's mental state needs further exploration. His representation that he wishes to litigate his criminal conviction and death sentence should be evaluated.

Following oral argument, we granted a Certificate of Appealability (COA) on the question of whether the District Court violated 21 U.S.C. § 848(q)(4)(B) in dismissing Michael's counsel and, if the District Court

so erred, whether this error was harmless.[5] But we did not rule on the Commonwealth's motion to dismiss the appeal.

On November 26, 2004, we received Michael's third letter; we construed it as a *pro se* motion to withdraw his appeal and to dismiss Cosgrove as his counsel. On December 3, we entered an order directing counsel for all parties to file a response to the *pro se* motion. In response, Cosgrove indicated on December 20 that Michael was "anything but steadfast in his desire to terminate this appeal or my representation of him."

On January 5, 2005, in another attempt to ascertain Michael's position, the panel entered an order that warned Michael as follows (emphasis in original):

> If you dismiss this appeal you will waive all further right to pursue this appeal. As a result you may also be denied any further review of your conviction and sentence by this or any other court. Additionally, in the future, you may be legally prohibited from filing a new habeas petition or other petition for review. *In short, your dismissal of this appeal may terminate any further judicial review of your conviction and sentence.*

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[5] Section § 848(q)(4)(B) provides that, "[i]n any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys...." 21 U.S.C. § 848(q)(4)(B), *repealed by* Terrorist Death Penalty Enhancement Act of 2005, Pub.L. No. 109-177, tit. II, subtit. B, § 222(c), 120 Stat. 192, 232 (2006).

On February 22, 2005, Michael sent his fourth letter to our Court. In it he indicated that he had read our January 5 order, and that he fully understood the consequences of his waiver. Michael noted that he had consulted with counsel, and that he nonetheless wished to withdraw his appeal.

But the following day, after a meeting with Cosgrove, a request was filed to defer any consideration of that letter for two weeks so that Michael could further consult with counsel. We deferred our decision to permit counsel time to meet once again with Michael.

On March 18, 2005, Cosgrove submitted a document, entitled "Report of Counsel," indicating that a litigation plan was under development for Michael and asking us to proceed with a resolution of the question presented in the COA. But 10 days later, Michael sent to us his fifth letter, indicating his desire to dismiss his appeal. A sixth letter followed on May 23, 2005, reiterating Michael's request to dismiss his appeal.

On June 2, our Court issued the following order:

> Inasmuch as the petitioner is represented by counsel, the pro se letters to withdraw the appeal are denied. The District Court's order entered March 10, 2004, is vacated to the extent that it dismissed Joseph M. Cosgrove, Esq., as counsel, granted Michael's motion to dismiss his habeas corpus petition and vacated the stay of execution. The matter is remanded for further proceedings to determine whether habeas corpus relief is warranted. We express no opinion on such questions as whether Michael's claims are exhausted, procedurally barred

> or meritorious. In the event that Michael files any further *pro se* motions to dismiss his petition, we urge the District Court to deny them summarily. See *Smith v. Armontrout,* 865 F.2d 1515 (8th Cir.1988); *St. Pierre v. Cowan,* 217 F.3d 939, 949-950 (7th Cir.2000).[6]

The Commonwealth filed a petition for panel rehearing or rehearing en banc. We filed an order denying the petition on July 7, 2005, and the mandate issued on July 8.[7]

The panel recalled the mandate on August 10, 2005, and granted panel rehearing, explaining that the June 2 order "le[ft] the District Court with little guidance in this complicated case as to our reasons for remanding the case for further proceedings and, indeed, [did] not identify what error (if any) the District Court committed in connection with the decision appealed." We Michael v. Horn, 144 Fed.Appx. 260, 263 (3d Cir.2005).[8]

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[6] Judge Greenberg dissented, stating that he would have dismissed the appeal.

[7] Judge Greenberg again dissented from the denial of panel rehearing. Michael v. Horn, 414 F.3d 456, 2005 WL 1606069, at *1-8 (3d Cir. July 7, 2005) (Greenberg, J., dissenting).

[8] Judge Greenberg concurred to emphasize that he viewed whatever had happened in the District Court respecting Michael's vacillations as "beyond the scope of our certificate of appealability." Michael, 144 Fed.Appx. at 264 (Greenberg, J., concurring). Judge Nygaard dissented because he believed that the June 2 order was correct and, to the extent it was ambiguous, could be supplemented. Id. at 264-65 (Nygaard, J., dissenting).

On September 19, 2005, Michael sent yet another letter to our Court, stating the following: "After having recently spoken to my attorney, Joseph Cosgrove, I am advising this court that I wish for no further appeals regarding my sentence of death."

Oral argument was scheduled for January 12, 2006. We received a letter from Dr. Wettstein on January 4. He wrote, among other things, the following:

> I understand that the Circuit Court has decided to reconsider the case of Hubert Michael, whom I previously evaluated for the District Court. The fact that Mr. Michael has again vacillated as to whether he should continue with his current appeal raises a concern as to whether any waiver of his appeal of his death sentence is valid and voluntary. My previous report to the District Court was premised in part on his apparent steadfastness which has now dissipated. Accordingly, before any decision is made regarding Mr. Michael's waiver of his rights, a further evaluation is warranted.

Then, on January 10, we received another letter from Michael (dated January 9). It read, "I want the Court to know that Joseph Cosgrove is both my friend and my lawyer, and I want him to remain my lawyer for the duration of this matter."

Michael sent a final letter on February 6. It read:

> This letter is to inform the court that I, Hubert L. Michael, Jr., wish for no further appeals regarding my sentence of death. Please do not misconstrue my last

> letter to this court where I stated that I would like Joseph Cosgrove to continue to represent me.
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> Yes, I would like Joseph Cosgrove to continue to represent me for as long as I am before any court regarding any criminal matter.... However, I ask for no further appeals regarding my sentence of death.

Dr. Wettstein also sent a letter, referring to Michael's February 6 letter, in which Dr. Wettstein reiterated that he "continue[s] to believe that further evaluation ... is warranted before any decision is made regarding a waiver of Mr. Michael's current appeal."

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § § 2241 and 2254. As noted, our Court granted a COA on whether the District Court violated 21 U.S.C. § 848(q)(4)(B) by dismissing Michael's counsel, so we have appellate jurisdiction under 28 U.S.C. § § 1291 and 2253[9].

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[9]A COA may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a "district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Where, as here, the District Court has rejected the claims on procedural grounds, the prisoner must establish "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it

III. Discussion

A. Can we dismiss Michael's appeal?

Before we can even consider the merits in this case, we must deal with whether we should dismiss Michael's appeal altogether, for Michael has indicated several times that he does not wish his appeal to proceed. To recap, we have letters to this effect dated April 14 and November 26 in 2004; February 22, March 28, May 23, and September 19 in 2005; and February 6 in 2006. On the other hand, Michael expressed a desire for his appeal to proceed on May 5, 2004. Cosgrove reported in December 2004 that Michael was "anything but steadfast in his desire to terminate this appeal," and Michael made no effort to have our June 2005 order (sending the case back to the District Court) reconsidered or appealed. And his letter of January 9, 2006, suggested that he wanted Cosgrove to "remain [his] lawyer for the duration of this matter."

Under Federal Rule of Appellate Procedure 42(b), appeals "may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." In United States v. Hammer, we stated that we had "discretion to grant, or to deny," a defendant's motion for dismissal. 226 F.3d 229, 234 (3d Cir.2000).[10]

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debatable whether the district court was correct in its procedural ruling." *Id.*

[10] It is also well settled that a defendant has a right to waive representation. See Faretta v. California, 422 U.S. 806, 834-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (establishing the right of criminal defendants to proceed without counsel when they elect to do so voluntarily and intelligently); see also United States v. Stubbs, 281 F.3d 109, 116 (3d Cir.2002).

So we can dismiss Michael's appeal. But we must first address whether Michael is competent to withdraw his appeal.

B. Is Michael competent to dismiss his appeal?

The District Court found Michael competent in its 2004 opinion. Normally, we would presume that Michael's competency continues to the present. See, e.g., Lonchar v. Thomas, 58 F.3d 588, 589 (11th Cir.1995) (per curiam); Smith v. Armontrout (Smith VII), 865 F.2d 1502, 1505 (8th Cir.1988) (en banc). But the presumption of continuing competency does not hold if "some substantial reason to the contrary appears." Smith VII, 865 F.2d at 1505.

We believe that such a "substantial reason" appears here. In the District Court proceedings, Dr. Wettstein's role was particularly important; his report and testimony were the bases for the District Court's competency finding. The Court expressed high regard for Dr. Wettstein in its opinion, calling him "exceptionally well-qualified," and stating that "[t]here was no evidence of possible bias on [his] part" and that "[t]here can also be no dispute about [his] qualifications." *Michael*, 2004 WL 438678, at *20. But Dr. Wettstein subsequently has thrice taken the position that Michael should be reevaluated. As noted above, after learning of Michael's desire to pursue this appeal, he wrote in June 2004 that "it is my psychiatric opinion that Mr. Michael's mental state needs further exploration. His representation that he wishes to litigate his criminal conviction and death sentence should be evaluated." In January 2006, Dr. Wettstein wrote again, stating that, because of Michael's vacillations, a concern had been raised "as to whether any waiver of his appeal of his death sentence is valid and voluntary. My previous report to the District

Court was premised in part on his apparent steadfastness [,] which has now dissipated." He wrote a third time-in February 2006-to suggest "further evaluation." This second-guessing by the expert who was the foundation of the District Court's competency finding constitutes a "substantial reason" not to presume continuing competency here.

The result in *Smith VII* is not to the contrary. There, Smith had changed his mind about whether he wished to pursue his *habeas* proceeding, apparently because he had gotten married. *Smith VII*, 865 F.2d at 1504. The *en banc* Eighth Circuit Court held that his change of position did not warrant reopening proceedings for the purpose of holding an additional competency hearing. *Id.* at 1506. The Court cited for support the conspicuous absence of "any allegations of new psychiatric examinations or new conduct by Smith, other than the facts of his marriage and his changes of mind." *Id.* at 1504. Although affidavits from three psychiatrists supporting reassessment were before the Court, these did not suffice either. None of these psychiatrists had ever examined Smith, they had all used language that was "carefully hedged and tentative," and the Court considered the dispositive issue to be "one of common sense and good moral judgment" rather than "of medical expertise." *Id.* at 1505.

But here Dr. Wettstein has examined Michael, and thoroughly. Moreover, Michael's previous steadfastness had been a key basis for Dr. Wettstein's conclusion of competence. Dr. Wettstein has not now declared Michael incompetent, but he has called for a new evaluation, in language that is neither hedged nor tentative. The principal source for the District Court's competency finding has wavered based on Michael's post-evaluation conduct. We therefore do not apply the presumption of continuing competency to the District Court's 2004 finding.

An appeal may not be withdrawn if the prisoner is incompetent. *See id.* at 1506-07 ("If someone decides that he or she prefers to acquiesce in a presumptively lawful judgment of a court, this decision should be respected, unless that person's mental condition is so abnormal that it does not meet accepted legal requirements."); cf. *Rees v. Peyton*, 384 U.S. 312, 313-14, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) (*per curiam*) (requiring a prisoner's competency to be determined before deciding whether to allow a prisoner to withdraw his *certiorari* petition); *Hammer*, 226 F.3d at 232 & n. 2 (noting that we were satisfied with Hammer's competency before granting his motion to dismiss his appeal). In *Rees v. Peyton*, the Supreme Court faced the question of how it should proceed when Rees, who had been convicted of murder and sentenced to death, directed his counsel to withdraw his petition for *certiorari* and to forgo any further federal habeas proceedings. 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583. Rees's counsel advised the Court that "he could not conscientiously accede to these instructions" without Rees's receiving a psychiatric evaluation. *Id.* at 313, 86 S.Ct. 1505. Rees was examined, but experts did not agree on whether he was incompetent. *Id.* The Court concluded that the District Court had to make a determination regarding Rees's competency before it could make a decision about the *certiorari* petition. Because his "mental competence [was] of prime importance" to the question of whether withdrawal would be allowed, the District Court was directed to "make a judicial determination as to Rees' mental competence and render a report on the matter to [the Supreme Court]." *Id.* at 313-14, 86 S.Ct. 1505. The Court further directed the District Court to determine whether Rees "ha[d] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he [was] suffering from a mental disease,

disorder, or defect which may substantially affect his capacity." *Id.* at 314, 86 S.Ct. 1505.

If we have any doubts about Michael's competency, *Rees* requires us to remand to the District Court for another competency hearing before we dismiss his appeal. Dr. Wettstein's letters do give rise to doubts about Michael's competency; thus we remand to determine if Michael is competent to make the decision to dismiss the appeal. Upon the District Court's making its determination, it should send us its report on the issue setting forth its conclusion and the reasons for it. If Michael is again found competent, and if he again wishes to withdraw his appeal, then we must obey his wishes. *Cf. Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (noting that an "accused has the ultimate authority" to decide whether to "take an appeal").

* * * * * *

We therefore remand this matter to the District Court for another competency hearing. By doing so, we do not rule on whether to dismiss this appeal or on the 21 U.S.C. §848(q)(4)(B) issue.[11] Michael has indicated that he wants Cosgrove as his attorney, and Cosgrove's continued representation is permissible on remand without an order from the District Court.

We note that, if Michael is again found competent, he will have one last opportunity*421 to have his appeal heard. Accordingly, the District Court, if Michael is found competent, should ask him the following question: "Do you wish the Court of Appeals to dismiss the appeal taken in your name from the

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[11] As already mentioned, however, this section was repealed in March 2006. Terrorist Death Penalty Enhancement Act of 2005, Pub.L. No. 109-177, tit. II, subtit. B, § 222(c), 120 Stat. 192, 232 (2006).

order entered in this Court dismissing the *habeas corpus* petition filed in your case?" If the answer is yes, we shall abide by that answer and dismiss the appeal.

GREENBERG, Circuit Judge, concurring.

I join in Judge Ambro's opinion remanding this case to the district court for the limited purposes of making another determination regarding Michael's competency before we determine whether to dismiss this appeal and to ascertain if Michael still wants us to dismiss the appeal. Nevertheless, because I have reservations regarding what we are doing and because in joining the opinion I am not being consistent with the position I took twice earlier on this appeal, I write this concurring opinion to explain why I am doing so.

At the outset I want to point out that there are two motions pending to dismiss the appeal: the respondents' motion and Michael's constantly repeated pro se letter motion. I focus on Michael's motion because it is the key to this appeal inasmuch as if he had wanted the appeal to be heard on the merits it likely already would have been heard and decided. On the other hand, unless constrained by Michael's letter to us on May 5, 2004, if he is competent to make the decision to ask us to dismiss this appeal, I agree with Judge Ambro that we should dismiss the appeal. I do not see how we could do otherwise inasmuch, as I will explain below, Michael did not take this appeal. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) ("[T]he accused has the ultimate authority to make [the] decision [ ] ... whether to ... take an appeal."); see also Faretta v. California, 422 U.S. 806, 834-36, 95 S.Ct. 2525, 2540-41, 45 L.Ed.2d 562 (1975).

The letter of May 5, 2004, which could prevent us from satisfying the obligation that we otherwise would have to dismiss this appeal, asked us to hear his

appeal on the merits. But if we decline to dismiss this appeal by reason of Michael's May 5, 2004 letter, which is his only communication to this court requesting that we entertain the appeal, we would have to disregard Michael's request on six occasions after May 5, 2004, that we dismiss his appeal. In my view, regardless of what might be appropriate if an appellant repeatedly changes his position on whether his case should be heard on the merits, or has not repeatedly stated that he wants the appeal dismissed, see St. Pierre v. Cowan, 217 F.3d 939, 949-50 (7th Cir.2000); Smith v. Armontrout, 865 F.2d 1515, 1516 (8th Cir.1988), inasmuch as Michael has not taken a seesaw approach on his request that we dismiss the appeal, neither St. Pierre nor Smith is a precedent that could support a decision to deny his motion to dismiss this appeal. Rather, it is clear that if Michael is competent and we do not dismiss this appeal we would not be following the Supreme Court's direction in Jones that a court must recognize that the accused decides whether to take an appeal. Thus, even though a court of appeals ordinarily exercises discretion in determining whether to dismiss an appeal, see United States v. Hammer, 226 F.3d 229, 234 (3d Cir.2000), in this case it seems clear to me that we do not have discretion to deny Michael's request or, if we do, that we would abuse our discretion if we did not grant his request.

It is highly significant, indeed remarkable, with respect to the tenuous nature of these proceedings, that Michael did not decide to take an appeal in this case in the first place and, in fact, this case never should have reached this court. Thus, the actual question before us is whether a defendant may cause an appeal filed in his name without his authority by someone else to be dismissed. In this case, the Capital Habeas Corpus Unit of the Defender Association of Philadelphia, without Michael's authorization, filed the appeal from the district court's order of March 10, 2004, granting Michael's motion to dismiss the habeas

corpus petition. Thus, this case truly is extraordinary because the Capital Habeas Corpus Unit filed this unauthorized appeal in the name of an appellant whom the district court had found to be competent, from an order that the appellant had sought and obtained and from which, quite naturally, he did not want to appeal.

Moreover, there is yet another extraordinary fact about this appeal. The Capital Habeas Corpus Unit filed the appeal even though the district court in its March 10, 2004 order dismissing the petition for habeas corpus also dismissed the Capital Habeas Corpus Unit and all its attorneys as counsel for Michael, Michael v. Horn, 2004 WL 438678, at *24 (M.D.Pa. Mar.10, 2004), and neither we nor the district court ever has stayed that order.[12] Accordingly, the Capital Habeas Corpus Unit acted without authority when it filed this appeal in an attempt to frustrate Michael's wishes. The reality of the situation could not be clearer. The Capital Habeas Corpus Unit, rather than representing Michael, its supposed client, was representing itself and advancing its own agenda when it filed this appeal.

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[12] The Capital Habeas Corpus Unit filed its notice of appeal solely on behalf of Michael and did not recite in the notice of appeal that it was appealing on behalf of itself. In accordance with our practice the clerk of this court entered an order on April 13, 2004, appointing the Capital Habeas Corpus Unit "to continue to represent" Michael on this appeal, thus demonstrating that the clerk did not know that the district court had dismissed the Capital Habeas Corpus Unit as counsel for Michael. It is understandable that the clerk did not know that the district court had dismissed the Capital Habeas Corpus Unit inasmuch as the Capital Habeas Corpus Unit filed the notice of appeal. In any event the clerk made the appointment after the Capital Habeas Corpus Unit filed the appeal so the clerk's order could not have given it the authority to file the notice of appeal. The appointment did not last long for a panel of this court revoked it on May 4, 2004.

Michael made the situation clear to this court at the outset of this appeal when he wrote an undated letter to Chief Judge Scirica that this court received on April 14, 2004, stating as follows:

> My name is Hubert L. Michael, Jr. I recently had my death warrant signed by the governor of Pennsylvania. I am not appealing my sentence.
>
> I was recently able to get the attorneys, with the Defender Association of Philadelphia, dismissed from trying to represent me in any capacity. This was ordered by Judge Thomas Vanaskie of the U.S. District Court.
>
> I am now writing you because I know that the courts had not heard the last of these attorneys with the Capital Habeas Corpus Unit.
>
> These attorneys are not authorized by me, or the courts, to file any petitions, etc., on my behalf. I ask this court to not recognize any petitions filed by these attorneys or any other individual.
>
> I would also like to state for the record the I am one-hundred percent mentally competent. As I pled guilty to homicide, in the Courts of Common Pleas, my mental state is the only avenue for these attorneys to pursue.
>
> Let's stop this legal merry-go-round by these attorneys.

As anyone can see, and as can be said with respect to all of Michael's correspondence to this court, the letter was completely clear and coherent and was not the product of an incompetent or mentally disturbed author. Quite to the contrary, Michael demonstrated in his April 14, 2004 letter that he had an excellent grasp of the situation confronting him as the Capital Habeas Corpus Unit already had filed its unauthorized appeal.[13] Accordingly, it is clear that from the very time that Capital Habeas Corpus Unit filed this appeal, the proceedings in this court have been irregular as the appeal never should have been taken.

It is important to remember that the appeal followed district court proceedings in which the court dismissed the petition at Michael's request only after the most meticulous consideration of his competency. The court started its opinion dismissing the petition by indicating that "[a]t issue in this matter is whether death-sentenced Hubert Michael is competent and has knowingly, rationally, and voluntarily chosen to waive ... a collateral challenge to his state court conviction and sentence." Michael v. Horn, 2004 WL 438678, at *1 (M.D.Pa. Mar.10, 2004). The court ended its opinion explaining as follows:

> To determine whether Mr. Michael is competent to decide to dismiss counsel and this habeas corpus proceeding, this Court sought to provide 'a constitutionally adequate fact-finding inquiry to make a

[13] I am uncertain when Michael found out that the Capital Habeas Corpus Unit filed the appeal, and thus I am uncertain if he was aware that it had filed the appeal before he wrote the April 14, 2004 letter. I do know, however, from the certificate of service attached to the notice of appeal that the attorney for the Capital Habeas Corpus Unit served the notice of appeal solely on a Pennsylvania Assistant Attorney General and that he did so by mail on April 8, 2004.

reliable determination....' Mata v. Johnson, 210 F.3d 324, 327 (5th Cir.2000). That process included (1) a current examination by a highly qualified expert [Dr. Robert Wettstein], (2) an opportunity for the parties to present pertinent evidence, and (3) an examination of Mr. Michael in open court concerning his decision to waive further proceedings. For purposes of this proceeding, Mr. Michael was also appointed independent counsel.

Throughout these proceedings, Mr. Michael has maintained the consistent position that he does not seek federal court intervention with respect to his conviction and sentence. Having found, without hesitation, that Mr. Michael is competent, and has made a knowing, rational and voluntary decision, this Court has no choice but to honor that decision.

As did the death-sentenced inmate in Comer [v. Stewart, 230 F.Supp.2d 1016 (D.Ariz.2002)], Mr. Michael "has made a competent and free choice, which 'is merely an example of doing what you want to do, embodies in the word liberty.' " 230 F.Supp.2d at 1072. Also worth reiterating here is the Eleventh Circuit's admonition in Sanchez-Velasco v. Sec'y of the Dep't of Corr., 287 F.3d 1015, 1033 (11th Cir.2002), affirming a district court's finding that a defendant competently, knowingly and voluntarily waived federal court collateral review:

> [W]e should not forget the values that motivated the Supreme Court's Whitmore

[v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)] decision and what is really at stake in this kind of case. These cases are about the right of self-determination *424 and freedom to make fundamental choices affecting one's life.... [A] death row inmate ... does not have many choices left. One choice the law does give him is whether to fight the death sentence he is under or accede to it. Sanchez-Velasco, who is mentally competent to make that choice, has decided not to contest his death sentence any further. He has the right to make that choice.... He has never asked [the attorneys] to represent him or consented to have them do so. He has directed them to leave his case alone, and the law will enforce that directive.

> Likewise, this Court has no choice but to enforce Mr. Michael's knowing, rational and voluntary directive that legal challenges to his conviction and sentence cease.

Id. at *23.

In considering this appeal we also should keep in mind that Michael is in an unusual position with respect to his attorney on the appeal, Joseph M.

Cosgrove. Michael wants Cosgrove to represent him, and thus he does not view Cosgrove in the negative way he views the Capital Habeas Corpus Unit. Yet as I explained in my dissent from the order denying rehearing on July 7, 2005, "Cosgrove and Michael are working at cross-purposes as it is clear that Cosgrove does not want us to dismiss Michael's appeal but Michael does." Michael v. Horn, 414 F.3d 456, 2005 WL 1606069 (3d Cir. July 7, 2005), 2005 U.S.App. LEXIS 13463, at *15.

Why then do we not dismiss this appeal at this time as Michael repeatedly has asked us to do? After all, it might be thought that if he was competent to dismiss the petition for habeas corpus surely he must be competent to dismiss the appeal. The reason is that Dr. Robert Wettstein, on whom the district court relied in finding Michael competent, since has expressed some words of caution regarding Michael's competency. Five days before we heard a preliminary oral argument in this case on June 22, 2004, and thus before we issued our limited certificate of appealability in this case dealing only with the discharge of his attorneys in the district court's March 10, 2004 order, we received a letter that had been signed by Dr. Wettstein indicating:

> I have...been informed that Mr. Michael represented to the Court of Appeals that he no longer wishes to be executed, but wants the legal issues in his case presented with the assistance of new legal counsel. Based upon his recent change of mind, it is my psychiatric opinion that Mr. Michael's mental state needs further exploration. His representation that he wishes to litigate his criminal conviction and death sentence should be evaluated.

Later Dr. Wettstein wrote a letter dated January 4, 2006, explaining that "a further evaluation is warranted" because Michael had "again vacillated" with respect to continuing his appeal. At that time Dr. Wettstein said that he would be willing to make the evaluation. He reiterated that position in another letter about a month later. It appears that he wrote these letters as a result of contact between him and Cosgrove.

Regardless of the etymology of these letters, obviously they should have caused us to pause before we dismissed the appeal, and they did have that effect. Yet we should consider the letters within the context of the actual history of this appeal. As Judge Ambro points out in his opinion, Michael wrote this court on April 14, 2004; November 26, 2004; February 22, 2005; March 28, 2005; May 23, 2005; September 19, 2005; and February 6, 2006, indicating that he does not want the appeal to proceed. The only time he took a contrary position was on May 5, 2004, when he requested that the appeal proceed.

It is true, as Judge Ambro also points out, that Michael "made no effort to have our June [2, 2005] order (sending the case back to the District Court) reconsidered or appealed," but neither Dr. Wettstein nor anyone else can draw any inference from that inaction. After all, could anyone really expect a litigant represented by counsel to file a pro se petition for rehearing or a petition for certiorari?[14] Moreover, when the respondents petitioned for rehearing of the June 2, 2005 order, Michael did not oppose that petition and ask us to adhere to the June 2, 2005 order. If his failure to seek a reversal of the June 2, 2005 order can give rise to an inference that he did not object to the remand, then his failure to object to the respondents'

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[14] The only ways Michael could have challenged the June 2, 2005 order was to petition for a rehearing or for certiorari.

petition for rehearing or to our August 10, 2005 order granting rehearing of the June 2, 2005 order and recalling the mandate issued following the June 2, 2005 order would require that we draw the reverse inference that he did not want the matter remanded as provided in the June 2, 2005 order.

It is also evident that the fact that he wants Cosgrove to be his attorney does not mean that Michael wants his appeal to be heard and cannot in any way suggest that he is vacillating with respect to that question. Michael clearly wants Cosgrove as his attorney at the same time that he wants his appeal to be dismissed, and there is no reason why this representation should not be permitted inasmuch as Cosgrove has agreed to be his attorney. Though I can understand why it might seem surprising that Michael still wants Cosgrove as his attorney inasmuch as they have different attitudes about whether we should dismiss the appeal, I also understand why he would want Cosgrove as his attorney as they frequently have conferred, and Cosgrove has visited him quite often. Plainly they have had a significant relationship. Indeed, in a letter to this court dated January 9, 2006, Michael described Cosgrove as his lawyer and "friend."

Now that I have given the background of the case as germane to the remand we are ordering, I will explain why I have reservations about the remand but nevertheless agree to it.[15] I first will explain why I have reservations focusing on Dr. Wettstein's letters and then explain my more general reservations regarding a remand. My first problem with Dr. Wettstein's letters is that I really do not know if he had been given the full

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[15] Actually my opinion already makes it obvious that I have reservations about the remand so my explanation of the reasons for the reservations at this point merely expands on what I have said.

picture before he wrote them. After all, as he explained in his June 2004 letter, he was basing his opinion on what he had been "informed," so that in assessing his letters it would be significant to know what information he had when he wrote them. In this regard I want to point out that in Dr. Wettstein's January 4, 2006 letter he said that a further evaluation is warranted because Michael had "again vacillated." Yet the factual basis for the statement is questionable because even if we treat Michael's February 5, 2005 letter asking for two weeks to reconsider his decision to have this appeal dismissed, to which Judge Ambro refers in his opinion, as reflecting vacillation, on March 28, 2005, he made it clear that he wanted the appeal to be dismissed and he has adhered to that position ever since. *426 Thus, from March 28, 2005, until January 4, 2006, Michael simply had not vacillated.

But I do not want to protract these proceedings any longer by suggesting that we remand the case for the district court to ascertain what information Dr. Wettstein had when he wrote his letters as a preliminary step before we determine whether we should remand the case for a further evaluation of Michael's competency. I reject this idea of a preliminary remand because a study of the record in this case shows that actually Michael has been quite consistent in his wish that we dismiss this appeal. Moreover, Dr. Wettstein has not repudiated the conclusion he stated to the district court that Michael at that time was competent to make the decision to dismiss the habeas corpus proceedings. He has suggested only that Michael be evaluated further. It seems clear to me that Michael has been consistent because Michael's only real inconsistency with respect to his wish to dismiss this appeal was on May 5, 2004, when he asked that we hear the case. It is true that, as Judge Ambro has explained, and I already have indicated, on February 5, 2005, Michael asked for two weeks more to consider whether he wanted the appeal

dismissed following which on March 28, 2005, he said he wanted it dismissed. It would be a stretch, but I suppose that a person asking for time to think over a decision could be characterized as vacillating.

In considering whether Michael's hesitation, which at the latest ended 16 months ago, can be regarded as indicating that he has been vacillating to such a degree as to reflect on his competency, we should remember what every judge and attorney knows, i.e., litigation whether criminal or civil does not go forward in a straight line, and litigants whose competency cannot be questioned and, in fact, is not questioned change their minds regarding critical issues during the course of litigation. I will give two examples known to everyone familiar with judicial proceedings.

Federal Rule of Criminal Procedure 11(b) sets forth a detailed list of requirements that a court must follow before accepting a plea of guilty, and state courts have similar procedures. One might suppose that when courts follow those rules, as they almost always do, and the defendant pleads guilty, that he quite conclusively has waived his right to a trial at least with respect to whether he is guilty of the offense for which he has been charged.[16] Yet there is an extensive body of case law dealing with motions by defendants to withdraw pleas of guilty. See, e.g., United States v. Jones, 336 F.3d 245 (3d Cir.2003). Obviously a defendant making such a motion has changed his mind and can be said to have vacillated but can anyone believe that merely because he does so that the court should order that a competency evaluation be made of him?

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[16] Sometimes a separate proceeding is required for determination of the sentence to be imposed. In fact, that was the situation in Michael's prosecution

It often correctly is said that the parties resolve most civil litigation through settlement agreements. But, as judges and attorneys know, a settlement does not always resolve the controversy at hand. That circumstance has given rise to much litigation dealing with enforcement of settlements, frequently because parties have changed their minds and reject settlements they earlier approved. See, e.g., Commc'n Workers of Am. v. N.J. Dep't of Personnel, 41 Fed.Appx. 554 (3d Cir.2002) (per curiam) ("The National ... notified the district court that the National no longer consented to the proposed settlement."). Should we conduct competency evaluations of civil litigants who reject settlements to which they have agreed?

In the context of what is involved in this case, I regard Michael's hesitation about this appeal going forward as not reflecting on his competency at all. For him this case has not involved money or even liberty. Rather, this litigation involves the ultimate question of life or death. If faced with his choice, the most competent and stable person might hesitate or vacillate before dismissing an appeal in an action that, if continued, surely would delay the execution of a death sentence, as it already has with respect to Michael, or, even if the chance of success may seem remote, actually preclude it.[17] Moreover, as I have explained, his actual degree of vacillation has been quite minimal. Thus, inasmuch as Dr. Wettstein has predicated his call for Michael's further evaluation on Michael's vacillation I have serious questions about the efficacy of Dr. Wettstein's suggestion. Accordingly, I have two problems with Dr. Wettstein's letters. First, I do not know that they reflect what actually happened with respect to Michael's vacillation. Second, I doubt that

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[17] Michael was aware of similar possibilities if he kept the district court proceedings going, but he elected not to do so. Michael v. Horn, 2004 WL 438678, at *11.

Michael's vacillation can be regarded as so significant with respect to his competency that it casts doubt on the prior unassailable determination of the district court that he was competent to decide whether this litigation should go forward.

As I said earlier, in addition to questioning whether Michael's minimal vacillation calls for his further evaluation, there are two more general reasons not specifically dealing with Michael's competency why I am agreeing with reluctance to a remand for a further evaluation. To start with there is no doubt about Michael's guilt. He did, after all, plead guilty. While I am aware that a defendant sometimes will plead guilty to a crime he has not committed, that did not happen here. After Michael murdered Trista Eng, he concealed her body in a wooded area. The body was not found until he confessed to his brother more than a month later that he murdered her and told him where he had concealed the body. His brother and other family members searched for and found the body and only then notified the Pennsylvania state police about the situation. Clearly, only the murderer could have known where the body could be found. Thus, this is not a case in which there is even a remote possibility that an innocent defendant has been convicted.

The second general reason not specifically related to Michael's competency why I have reservations regarding the remand concerns Trista Eng herself as well as her family. I realize that it sometimes seems that the criminal law is more concerned with defendants than victims. I regret this fact, but it is inevitable as a prosecution and trial focus on what the defendant did and the procedures that must be followed with respect to his plea and, depending on his plea, to his trial. Yet this imbalance has caused concern among legislative bodies and it is good to be able to note that they have taken steps to

redress the imbalance such as by passing victims' rights statutes.

More than 13 years have passed since Michael murdered 16-year old Trista Eng who was a total stranger to him. He encountered her when she was on her way to work at a Hardees restaurant where she had a summer job. In a wanton and senseless act, he murdered her because he faced rape charges involving another woman that he felt were not justified. He pleaded guilty to murdering Trista Eng, *428 and the Pennsylvania Supreme Court upheld his conviction on a mandatory appeal, Commonwealth v. Michael, 544 Pa. 105, 674 A.2d 1044 (1996), and later affirmed the trial court's denial of post-conviction relief. Commonwealth v. Michael, 562 Pa. 356, 755 A.2d 1274 (2000). Then, at Michael's own request at a time that he undoubtedly was competent, the district court dismissed the habeas corpus proceedings started in his name. There can be no doubt that Michael was competent when he asked the district court to dismiss the habeas corpus proceedings. Indeed, when we issued the certificate of appealability in this case we did not even mention a competency question, and thus even if we did not dismiss the appeal we could not review the district court's determination that Michael was competent to cause the habeas corpus proceedings to be dismissed.

I cannot help but think that the proceedings in this case must be torturing the family of Trista Eng. Her family knows what everyone who is familiar with this case knows, i.e., Michael murdered her, and though he has been sentenced to die and the Pennsylvania courts have upheld his conviction and sentence both on direct appeal and on a collateral review, the sentence has not been carried out. Though no one can say for sure how Trista Eng's life would have unfolded, I can say that if Michael had not murdered her she would now be a 29-year old woman

and would have had an opportunity to live her life and to marry and have her own family. Michael deprived her of that opportunity.

Indeed, I cannot help but wonder whether Michael has sought to terminate these proceedings because he recognizes the harm that he has done to Trista Eng and her family and has been trying to terminate the judicial proceedings knowing that if he does so he will make amends so far as he now can do. I say this because surely he must have felt remorse after he murdered Trista Eng for I can discern no other reason why he confessed to his brother that he had murdered her. Thus, it seems that, notwithstanding the crime that Michael committed, he plainly differs from the remorseless defendants that courts sometimes see who exalt in what they have done.

I ask this question: Does not the court system owe anything to Trista Eng and her family and, so far as it can do so, while acting consistently with the law, should it not bring her family's torture to an end, particularly when the person responsible for her murder wants it ended? I know that with respect to criminal punishments death is different. See Furman v. Georgia, 408 U.S. 238, 306-07, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). But cannot the same thing be said with respect to the effect of the crime of murder on the victim and her family as compared to all other crimes? Is our law so one sided that at a trial and on appeals only the defendant is of any importance?

Anyone who reads my opinion might wonder why, instead of joining in Judge Ambro's opinion, I am not dissenting and voting to dismiss this appeal. Moreover, in this regard a reader could point to my dissent from the June 2, 2005 order remanding the case in which I said that I would dismiss the appeal and my dissent from the order denying the petition

seeking a rehearing of the June 2, 2005 order in Michael v. Horn, 414 F.3d 456, 2005 WL 1606069, 2005 U.S.App. LEXIS 13463, at *26, in which I indicated that I believed that "the panel should grant rehearing, vacate the June 2, 2005 order, and dismiss the appeal." Indeed, a reader reasonably could assert that by joining in Judge Ambro's opinion I am vacillating.

But in the end there are three reasons why I am not dissenting and instead am joining in Judge Ambro's opinion. First, of course, I believe that regardless of the considerations I have set forth, Judge Ambro's opinion is correct and I cannot allow my personal view of a case to trump my obligation to follow the law.[18] Second, at the time of the June 2, 2005 order remanding the case and at the time of the denial of the petition seeking rehearing of that order the situation was different than it is now because the panel was remanding the matter to the district court "for further proceedings to determine whether habeas corpus relief is warranted," thus opening up the entire case in the district court in complete disregard of the limitations in our certificate of appealability, and the panel was adhering to that position when denying rehearing. I thought that these orders were not justified. Now the panel is taking what seems to me to be the more reasonable and nuanced position that Michael be reevaluated. Thus, the choice I face now is different from that which I faced a year ago.

Third, I have reconsidered the district court's opinion in this matter in the light of Judge Ambro's opinion and have taken particular note that the district court indicated that in considering Michael's

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[18] If I had written the majority opinion, in some respects it would have differed from what Judge Ambro wrote. But it is always true that even though judges agree on the appropriate outcome of a case, they would not write identical opinions.

competency its "process included ... a current examination by a highly qualified expert," i.e., Dr. Wettstein. Indeed, the district court listed Dr. Wettstein's examination as the first step in its three-step competency inquiry. Now that that highly qualified expert believes there should be a further evaluation, whatever my reservations, I think that it is appropriate to accede to his suggestion.

In closing I want to comment on the limited scope of our remand. We are remanding the case for the district court to determine if Michael is competent to dismiss this appeal. If he is and he adheres to his decision to dismiss the appeal, we will do so and the appeal will be over. In that event it will not matter whether the determinations that the district court made leading to its order of March 10, 2004, dismissing his habeas corpus petition were correct or incorrect as we cannot review them.

On the other hand, if Michael is not competent to dismiss the appeal or if he is competent to do so but asks us to adjudicate it on the merits we will not dismiss the appeal. Rather, we will decide the appeal. In that event we will have jurisdiction to answer only the single two-part question on which we granted a certificate of appealability on June 30, 2004, "whether the District Court violated 21 U.S.C. § 848(q)(4)(B) by dismissing counsel for Hubert Michael and, if the District Court so erred, whether the error was harmless." See Miller v. Dragovich, 311 F.3d 574, 577 (3d Cir.2002).

I make the foregoing point so that it should be clear that the proceedings on the remand need not be protracted. The district court on the remand will not be dealing with a quasi-motion for reconsideration of its March 10, 2004 decision and order and will not be reexamining its original determinations including, in particular, its determination that Michael was

competent to cause the habeas corpus proceeding to be dismissed and that he had made "a knowing, rational and voluntary decision" to cause it to be dismissed which the court was obliged to honor. It will be dealing with his competency now to dismiss this *430 appeal. Thus, any reference to Michael's competency during the period this case was pending in the district court or to the evidence on that issue can be germane on the remand only insofar as it may have bearing on his competency now.

For all the reasons that I have stated and notwithstanding my reservations, I join in Judge Ambro's opinion ordering a remand in this case for the limited purposes that the district court determine Michael's competency to dismiss the appeal and for the district court to ask Michael whether he still wants us to dismiss the appeal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-9002

HUBERT L. MICHAEL,

Appellant

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; *DAVID DIGUGLIELMO, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview.

* (Amended - See Clerk's Order dated 1/6/05)

Appeal from the United States District Court
For the Middle District of Pennsyvlania
(D.C. Civil Action no. 96-cv-01554)
District Judge: Honorable Thomas I. Vanaskie

Before: AMBRO, GREENBERG, and NYGAARD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Middle District of Pennsylvania and was argued on January 12, 2006.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this case is remanded to the District Court for further proceedings consistent with the opinion of this Court. We do not rule now on the motions to dismiss the appeal. All motions regarding Michael's correctional-facility transfer are denied as moot.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: August 18, 2006

Appendix B

United States District Court,
Middle District Pennsylvania.

Hubert L. MICHAEL	:
Petitioner	:
v.	:
Martin HORN,	:No. 3:CV-96-1554
Commissioner, Pennsylvania	:
Dep't of Corrections;	:
Donald T. Vaughn,	:
Superintendent of the	:
State Correctional Institution	:
at Graterford; Joseph P.	:
Mazurkiewicz, Superintendent	:
of the State Correctional	:
Institution at Rockview	:
Respondents	:

MEMORANDUM

At issue in this matter is whether death-sentenced Hubert Michael is competent and has knowingly, rationally, and voluntarily chosen to waive pursuit of a collateral challenge to his state court conviction and sentence. To decide these questions, I have carefully considered (a) the report and corroborating testimony of Robert M. Wettstein, M.D., a psychiatrist appointed by this Court to evaluate Mr. Michael in accordance with *Rees v. Peyton,* 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), and other pertinent authority; (b) the testimony of Harry Krop, Ph.D., a forensic psychologist presented by the Defender Association of Philadelphia, Capital Habeas Corpus Unit (hereinafter referred to as the "CHCU"), whom Mr. Michael seeks to dismiss as his counsel; (c) the record of state court proceedings concerning Mr. Michael's competency; (d) the exhibits presented at the hearing conducted by this Court; (e) this Court's

colloquy of Mr. Michael; and (f) the post-hearing submissions made by Respondents, the CHCU and Mr. Michael. Based on my review of all pertinent materials, I have concluded that Mr. Michael is competent and his decision to forego a federal court collateral challenge to his state court conviction and sentence is knowing, rational and voluntary.

The CHCU argues that even if Mr. Michael may dismiss it as his counsel and abandon this litigation, it has presented a "non-waivable" claim, which this Court must adjudicate. Specifically, the CHCU insists that this Court address the merits of its claim that the prosecutor, defense counsel, and the state trial court "colluded with each other to impose a death sentence simply because Mr. Michael asked for it." (Petitioner's Memorandum Regarding Non-Waivable Claim (Dkt. Entry 109) at 2; emphasis in original.) Because governing Supreme Court and Third Circuit precedent precludes this Court from adjudicating a petition that Mr. Michael has knowingly, rationally and voluntarily chosen not to pursue, e.g., Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976); United States v.. Hammer, 226 F.3d 229 (3d Cir.2000), the habeas corpus petition filed by the CHCU-without Mr. Michael's authorization-will be dismissed without considering the merits of the so-called "non-waivable" claim.

I. BACKGROUND

On the morning of July 12, 1993, Mr. Michael pulled up along side 16-year-old Trista Eng, who was walking to her summer job at a Hardee's Restaurant.[1]

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[1]Unless otherwise indicated, the facts underlying Mr. Michael's conviction have been gleaned from the Pennsylvania Supreme Court's decision affirming the death

Mr. Michael offered to drive her to work. Trista accepted the invitation. Instead of taking Ms. Eng to her summer job, Mr. Michael drove to a remote location in the State Game Lands in York County. He then forced Ms. Eng out of the vehicle, and shot her three times with a .44 magnum: once in the chest, once in the back, and once in the back of the head. He then concealed the body in some weeds.

At the time of the murder, Mr. Michael was being prosecuted on a rape charge. Asserting that sex with the rape complainant had been consensual, Mr. Michael believed that he was the victim of an unjust prosecution. He has explained the murder of Ms. Eng as an act of vengeance for the unjust prosecution.

Several days after committing the murder, Mr. Michael fled the state in a rental vehicle. He was apprehended by Utah state police on July 27, 1993. A .44 magnum was found in the rental car.

Mr. Michael was brought back to the Commonwealth and jailed in the Lancaster County Prison on the pending rape charges. On August 24, 1993, while incarcerated at the Lancaster County Prison awaiting trial on the rape charges, Mr. Michael confessed to his brother that he had murdered a young woman and hid her body in the State Game Lands in York County. Mr. Michael's brother and other family members searched the area described by Mr. Michael, and eventually located a badly decomposed body wearing the remnants of a Hardee's Restaurant uniform. Id. The Pennsylvania State Police was summoned, and the body was later identified as that of Trista Eng. On August 27, 1993, Mr. Michael was charged with first degree murder.

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penalty, Commonwealth v. Michael, 544 Pa. 105, 674 A.2d 1044 (1996) (hereinafter Michael I).

At about the time he was charged with the murder of Ms. Eng, Mr. Michael fell down a flight of stairs at the Lancaster County Prison. (P-6, Lancaster Co. Prison records introduced at the Sept. 26, 2002 hearing.)[2] The Lancaster County Prison records from August 27, 1993 through September 1, 1993 document concerns that Mr. Michael was suicidal. On September 1, 1993, he was transferred to the "Medical Housing Area" for "closer observation." [3]

The Lancaster County Prison records, however, also document Mr. Michael's assertion that the fall down the stairs was not deliberate. According to the records, Mr. Michael stated that "if he wanted to kill himself he wouldn't jump down the stairs because that wouldn't kill him." Mr. Michael repeatedly denied any suicidal ideation.

In November of 1993, Mr. Michael escaped from the Lancaster County Prison by assuming the identity of another inmate who was scheduled to be released. (Dr. Wettstein Report at 7.) He was apprehended in New Orleans in approximately March, 1994. Upon being returned to the Commonwealth, he was jailed in the York County Prison.

While incarcerated in the York County Prison, Mr. Michael was prescribed Benadryl 50 mg for a skin rash. After hoarding the pills, Mr. Michael, on July 13, 1994, ingested 60 Benadryl tablets. Mr. Michael was hospitalized for this incident, which was viewed as an

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[2] The fall down the stairs is documented in a progress note entry for August 30, 1993. Above the entry, however, is the notation, "Late Entry 8-22-93."

[3] The prison record ascribes to Mr. Michael a suicide status of Level 1. The record indicates there are three levels, but no explanation of the levels is provided.

attempted suicide.[4] There is, however, no evidence that Mr. Michael received any psychiatric treatment at this time.[5] (1/13/97 PCRA Tr. at 107.)

Mr. Michael first stood trial on the Lancaster County rape charge. In September, 1994, he was convicted of rape, and subsequently sentenced to a prison term of 20 years.

Jury selection on the homicide charge commenced in Berks County on October 11, 1994.[6] During jury selection, Mr. Michael's counsel informed the trial judge that Mr. Michael had elected to plead guilty to first degree murder and kidnapping. As explained by the Pennsylvania Supreme Court:

> [A] review of the guilty plea colloquy establishes that the trial court questioned [Michael] at length regarding whether his guilty plea was knowing and voluntary including, *inter alia,* that he had discussed the matter carefully with his attorney, that he understood the charges against him including the charge of first degree murder, his right to a jury trial or bench trial, the presumption of innocence, the Commonwealth's burden

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[4] A psychiatrist has testified that Mr. Michael would have had to ingest 50 times as much Benadryl to receive a lethal dosage. (1/13/97 Transcript. of York County Post Conviction Relief Act ("PCRA") proceedings at 107.) Hereinafter, the transcript of the PCRA proceedings will be cited by the date of the hearing. Transcripts of this Court's hearing will be cited as follows "[Date] Habeas Tr. at ____."

[5] Mr. Michael suggested to Dr. Wettstein that this may have been an attempted escape. (10/21/02 Habeas Tr. at 6.)

[6] Mr. Michael's counsel had secured a change of venire. Michael I, supra note 1, at 108 n. 1, 674 A.2d 1044.

> proof, the right to confront the Commonwealth's witnesses, his waiver of those rights, his limited rights upon pleading guilty, the voluntariness of his plea, the elements of first degree murder, that the penalty for first degree murder is either life imprisonment or death which would be determined at a separate hearing, that his rights at the sentencing hearing includ[ed] the right to present any mitigating circumstances, and that he was satisfied with counsel.

Michael I, 544 Pa. at 108 n. 2, 674 A.2d 1044.

Within a week of pleading guilty, Mr. Michael advised the trial judge that he wanted to withdraw his guilty plea, asserting that he was not competent at the time of entering the plea and was having difficulty communicating with trial counsel. See Commonwealth v. Michael, 562 Pa. 356, 362-63, 755 A.2d 1274, 1277 (2000) (hereinafter Michael II). The request was denied. Pursuant to Mr. Michael's request, the trial court scheduled selection of a jury to determine whether the death penalty should be imposed.

On March 3, 1995, during a pre-sentencing conference, Mr. Michael informed the court that he did not want his attorney to present evidence of mitigating circumstances. Michael II, 562 Pa. at 365, 755 A.2d 1274. The trial court, however, instructed defense counsel to be prepared to present evidence of possible mitigating circumstances, and informed Mr. Michael that he retained the right at the sentencing hearing to present evidence of mitigating factors.

On March 20, 1995, the date set for jury selection on the sentencing phase of the case, Mr. Michael informed the trial court that he had decided to waive his right to be sentenced by a jury, would

stipulate to the existence of the two aggravating circumstances alleged by the Commonwealth, and would stipulate that there were no mitigating circumstances. As described by the Pennsylvania Supreme Court:

> Again the record reveals that the sentencing court conducted an extensive colloquy in order to make certain that [Michael's] stipulation was knowing and voluntary. The sentencing court expressly questioned [Michael] regarding whether he understood his right to present mitigating circumstances, his right to be sentenced by a jury, and that the jury might sentence [him] to life imprisonment rather than death if mitigating circumstances were presented. [Michael], however, responded that he understood these rights and the benefits of having mitigating circumstances introduced at his sentencing hearing but declined his right to do so. He further stated that he was satisfied with counsel.

Michael I, 544 Pa. at 109 n. 4, 674 A.2d 1044. The trial court accepted Mr. Michael's waiver of a right to a jury trial on the sentencing phase of the case, and, finding that aggravating circumstances outweighed mitigating circumstances, imposed the death penalty.

On March 24, 1995, Mr. Michael signed an affidavit which confirmed his understanding of his right to litigate, before a jury or a judge, the question of his guilt, the degree of murder, and whether the death penalty was warranted. Id. at 111 n. 6, 674 A.2d 1044. The affidavit further confirmed that Mr. Michael had instructed his counsel not to call witnesses or present any evidence during the sentencing hearing. Id. The affidavit concluded:

> 12. Should I receive a sentence of death, I have instructed my attorney ... to forward this Affidavit to the Supreme Court of Pennsylvania.
>
> 13. It is my intent to inform the Pennsylvania Supreme Court that I am satisfied with my pleas of guilty and the sentence of death I receive in order that the Pennsylvania Supreme Court affirm as rapidly as permitted by law, the conviction and sentence.
>
> 14. Finally, my attorneys have reviewed this case and this Affidavit with me and I am satisfied with their representation.

Id.

Although presented with this affidavit, the Pennsylvania Supreme Court undertook an independent review of the record.[7] In an opinion issued on April 17, 1996, the court found that the elements of first degree murder were established; the sentence of death was not the product of passion, prejudice or other arbitrary factor; the record established the existence of at least one aggravating circumstance; and the sentence was not disproportionate when compared to sentences imposed in similar circumstances. Based

[7] The court explained that it was obligated to conduct an independent review of the record in any case in which the death penalty has been imposed. Michael I, supra note 1, 544 Pa. at 110, 674 A.2d 1044. Pennsylvania is 1 of 37 states that provides for review of all death sentences regardless of the defendant's wishes. See Thomas P. Bonczar & Tracy L. Snell, U.S. Dep't of Justice, "Capital Punishment, 2002," in Bureau of Justice Statistics Bulletin, at 3 (Nov.2003).

upon these findings, the unanimous Supreme Court affirmed the conviction and sentence, explaining that "[w]here there are no mitigating factors and a finding of at least one aggravating circumstance, the sentencing court has no discretion but to impose the death penalty." Id. at 113, 674 A.2d 1044.

On July 31, 1996, Governor Thomas Ridge signed an execution warrant. Mr. Michael's execution was scheduled for August 27, 1996 at 10:00 p.m.

On August 21, 1996, the CHCU filed in this Court a motion for stay of execution and request for appointment of counsel. (Dkt. Entry 1.) On August 22, 1996, in accordance with McFarland v. Scott, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), the execution was stayed and the CHCU was appointed as counsel for Mr. Michael. (Dkt. Entry 4.)

On August 29, 1996, Respondents petitioned the Court to rescind the appointment of counsel for Mr. Michael and to vacate the stay of execution. (Dkt. Entry 8.) In support of this request, Respondents presented Mr. Michael's letter to the York County District Attorney's Office dated August 24, 1996, which stated:

> On or about Wednesday, August 21 and Thursday, August 22, I signed some papers that would give me a 60 or 90 day stay of execution. These papers were brought to me by some representatives of the [CHCU]. I felt pressured to sign these papers by certain family members and also some representatives of the [CHCU].
>
> After thinking this over, I have dismissed these people from representing me in any court proceedings. On a visit to Graterford on Friday, August 23, I informed Pam Tucker, a representative of [CHCU], that

she and her associates were dismissed from acting as my attorneys in any future legal matter.

Furthermore, I do not want any court documents, trial transcripts, police reports, or any other papers released to any people who claim to represent me. This also applies to my case in Lancaster as well. I do not give anyone my authorization to obtain such documents on my behalf. When my stay expires I wish to have the Governor re-sign my warrant as soon as possible.

The CHCU responded by asserting that Mr. Michael was not competent. In support of this assertion, the CHCU related that Mr. Michael's sisters and brother had recounted that Mr. Michael had been the victim of an abusive father, suffered bouts of depression, and abused drugs, including cocaine, quaaludes, heroin, percodan and steroids. They also asserted that he had sustained a serious head injury in his youth, and had become withdrawn following his mother's death in 1988. The CHCU also referred to Mr. Michael's vacillation during the course of the state court proceedings: entering a guilty plea only on the date of jury selection; trying to withdraw the plea less than a week later; requesting a jury determination of the appropriate sentence; and then waiving that request on the date of jury selection. The CHCU also related that Mr. Michael had exhibited bizarre and erratic behavior in the presence of members of the CHCU, but had authorized filings in state and federal court to contest his conviction and sentence. (Dkt. Entry 12.)

By Order dated October 10, 1996, the CHCU was directed to meet with Mr. Michael to determine his position with respect to its continued representation of

him. (Dkt. Entry 27.) On October 22, 1996, the CHCU filed a statement of its position, along with a supporting declaration of Attorney Billy H. Nolas. In his declaration, Attorney Nolas related that he had met with Mr. Michael on October 17, 1996. According to Attorney Nolas, during the meeting, Mr. Michael "was agitated, incoherent, irrational, sad, unable to control his varying emotions, and ultimately became catatonic and completely uncommunicative." (Declaration of Billy H. Nolas, Esq. (Dkt. Entry 30) at ¶ 9.) Attorney Nolas' declaration concluded that, on October 21, 1996, Mr. Michael had authorized the CHCU to litigate his post-conviction proceedings. Attorney Nolas asserted that "I do not believe that there is any 'waiver' issue before the Court and request, as appointed counsel, that the Court allow us to complete and file Mr. Michael's habeas petition." (Id. at ¶ 11.)

On October 25, 1996, the CHCU supplemented the statement previously submitted and requested a status conference. (Dkt. Entry 31.) Attached to the supplemental statement was a document signed by Mr. Michael, which provided:

> I, Hubert L. Michael, Jr., hereby retain Billy Nolas to represent me for all purposes in regard to PCRA proceedings presently ongoing in the Court of Common Pleas of York County, Pennsylvania. I do not authorize representation by any other attorney.

The first sentence of the statement was typewritten. The second sentence of the statement was handwritten, apparently by Mr. Michael.

Because proceedings under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons.Stat. Ann. § § 9541, et seq., had been commenced in the Court of Common Pleas of York County, this Court, by

Order dated November 21, 1996, stayed this habeas corpus proceeding pending the exhaustion of state court remedies. (Dkt. Entry 35.) Respondents appealed the November 21, 1996 Order. By judgment order dated June 16, 1997, the stay of this litigation was affirmed by the Third Circuit. (Dkt. Entry 55.)

The Court of Common Pleas of York County conducted evidentiary hearings that concerned, inter alia, Mr. Michael's competence to plead guilty and waive presentation of mitigating circumstances. In connection with this issue, Mr. Michael submitted to psychiatric and neuropsychological evaluations.

The neuropsychologist retained by the CHCU, Barry M. Crown, Ph.D., concluded that Mr. Michael was "brain damaged with deficits in multiple cognitive and affective areas," with "the causative basis for this [being] both neurodevelopmental and the result of substance use." (Dr. Crown's Report of November 21, 1996.) Dr. Crown testified during the PCRA proceeding that Mr. Michael was not competent at the time of his guilty plea and sentencing proceedings. (12/13/96 PCRA Tr. at 91.)

Mr. Michael's counsel also presented the testimony of Harry Krop, Ph.D., a Florida clinical psychologist. Dr. Krop opined that he had "substantial questions regarding [Michael's] competency both in terms of entering a plea, waiving his rights and so forth."[8] (12/30/96 PCRA Tr. at 174.) In response to questioning from the state trial court as to whether Dr.

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[8]Dr. Krop explained that he was not in a position to opine that Mr. Michael was incompetent in 1994 and 1995 because he had not evaluated him during that time period. (12/30/96 PCRA Tr. 175-76.) His testimony was evidently offered to support the claim that trial counsel had been ineffective in failing to have a psychiatric evaluation of Mr. Michael made.

Krop's opinion concerned only Mr. Michael's competency at the time of his guilty plea and sentencing, or that Mr. Michael is "incompetent generally and can't cooperate with counsel ever," Dr. Krop stated, "It's my opinion as of [December 12, 1996] that he was competent to proceed at this proceeding." (*Id.* at 187.) In the course of Dr. Krop's testimony, he also stated that "the capacity to communicate with an attorney and relate is one of the more significant issues with regard to the competency criteria." (*Id.* at 186.)

In December of 1996, Dr. Krop had participated in a clinical interview of Mr. Michael along with the Commonwealth's expert, Larry A. Rotenberg, M.D., Director of Psychiatry for the Reading Hospital and Medical Center. To avoid duplicative testing, Drs. Krop and Rotenberg agreed to share results. Testing included a Wechsler Adult Intelligence Scale-Revised, which revealed a full scale IQ of 100, the same IQ result obtained in testing in 1972, when Michael was 16 years old. Dr. Rotenberg interpreted the test results as consistent with a finding that Mr. Michael was competent intellectually and exhibited no signs of organic dysfunction. (December 12, 1996 Report of Dr. Rotenberg at 12.) Dr. Rotenberg further reported that the Beck Depression Inventory and Beck Anxiety Inventory, administered by Dr. Krop, "yielded scores which are non-symptomatic, non-depressed, and non-anxious." (Id.) The Minnesota Multiaxial Personality Inventory-2 ("MMPI-2") "showed a normal personality profile with no elevated subscales." Dr. Rotenberg explained that the test results were "also indicative of a lack of organicity and lack of defect in the central nervous system." (Id.) Dr. Rotenberg's diagnostic impressions were "[h]istory of multi-substance abuse and possibly dependence," "Antisocial Personality Disorder," and Narcissistic Personality Disorder."[9] (Id.

[9]According to the Diagnostic and Statistical Manual of Mental Disorders, 4th ed., Text Revision (2000) (DSM-IV-TR),

at 13.) Dr. Rotenberg's report concluded that Mr. Michael "is currently competent to make all his decisions," and that, "[w]ithin reasonable medical certainty it can be said that at no time was this individual in a situation where he was not competent to make decisions or to know the consequences of his decisions." (Id.)

Dr. Rotenberg testified during the PCRA hearings in a manner consistent with his report. (1/13/97 PCRA Tr. at 84-97.) During the course of his testimony, he explained that the diagnosis of antisocial and narcissistic personality disorders did not involve major mental illness nor psychosis. (Id. at 97-98, 100-101.) He also related that these disorders are not considered to be exculpatory conditions. (Id. at 98, 101.) In discussing the antisocial personality disorder, Dr. Rotenberg testified that such a "person has a complete ability to not do what they have done." As an example of behavior reflecting an antisocial personality, Dr. Rotenberg referred to Mr. Michael's escape from prison in November of 1993:

> The escape [from] Lancaster County Prison is both brilliant and sociopathic. It's brilliant because it takes an enormous amount of plotting to sit in a cell with someone else to steal the other person's identity, to walk out when the other

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an "antisocial personality disorder" is a "pattern of disregard for, and violation of the rights of, others." (Id. at 685, 674 A.2d 1044.) A "narcissistic personality disorder" is "a pattern of grandiosity, need for admiration and lack of empathy." The DSM-IV-TR defines a "personality disorder" as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." (Id.)

> person is called, and to walk away from prison.
>
> So that is brilliant, and it is very competent, but it's also sociopathic. It's antisocial in the sense that he had no connection with the fact that the other person was suffering. A breathing human being who by taking his identity away was obviously going to endure a lot of hardship.

(Id. at 99.) Dr. Rotenberg also testified that he disagreed with Dr. Crown's assessment of brain damage, pointing to the fact that Mr. Michael had attained the same IQ score in 1972 and 1996, even though the drug use on which Dr. Crown had relied occurred between those two years. (Id. at 105.)

The state trial court denied relief on all claims.[10] Mr. Michael, represented by the CHCU, took an appeal to the Pennsylvania Supreme Court.

While the matter was pending before the Supreme Court, Michael filed an affidavit indicating that he wanted to withdraw the appeal. Michael II, 562 Pa. at 360, 755 A.2d 1274. The CHCU again questioned Mr. Michael's competence to make such a decision. The high court remanded the matter to the trial court to determine whether Mr. Michael was competent to discontinue the PCRA appeal.

The trial court again conducted an evidentiary hearing. Prior to the start of the hearing on February 23, 1999, Attorney Nolas presented on behalf of Mr. Michael an affidavit indicating that Mr. Michael did not desire to undergo additional psychiatric evaluation, did

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[10] The record before this Court does not include the PCRA Court's decision.

not want a hearing on his current mental state, and asked to have the appeal on the merits decided expeditiously by the Pennsylvania Supreme Court. (2/23/99 PCRA Tr. at 4-5.) The York County Court elected to proceed with the hearing. Only Dr. Rotenberg testified. He reiterated his conclusion that Mr. Michael was not suffering from a major mental illness. (Id. at 16-17, 755 A.2d 1274.) As to the contention that he was suffering from depression and that his decision to abandon appeals was a reflection of this mental illness in order "to have the state help him with a sort of state assisted suicide," Dr. Rotenberg testified:

> In my opinion ... nothing could be further from the truth. Mr. Michael has, in my opinion, never been depressed. He has never suffered from a major depression. I believe that, if I recall correctly, ... way back he took an overdose somewhere in the prison. Again, as a product of his inability to tolerate frustration and to delay gratification, but I do not believe that he was ever clinically depressed.... He never had the clinical symptoms of depression or of dysthymic disorder.
>
> I think it is important to note ..., people with personality disorders will try to hurt themselves or others for the simple reason that they have trouble delaying disposition, delaying gratification, and in my view, Mr. Michael never had a depression, never suffered from depression, that his reasoning was never impaired by depression.
>
> That, in fact, in the five-hour interview [conducted in December of 1996], which included a number of tests including the Beck Depression Inventory and other

> [inventories] indicating depression, in fact, he scored very low and very normally. So that, in my view the essential element of his capriciously and repeated changing of his mind is merely a product of the continuing nature of his personality difficulty, which is not a mental illness, which does not incapacitate him in any way, which does not make him unable to make decisions.
>
> On the contrary, in reviewing the material provided ..., one is constantly struck by the very logic ... and reasonableness of Mr. Michael's opinions with regard to his own decision at any one point.

(Id. at 18-19, 755 A.2d 1274.)

Following Dr. Rotenberg's testimony, the court engaged in a colloquy with Mr. Michael, who confirmed that it was his desire that the Pennsylvania Supreme Court decide the appeal quickly based on the merits of the case. (Id. at 36, 755 A.2d 1274.) He also confirmed that he did not want to participate in any additional psychiatric evaluations. (Id. at 35, 755 A.2d 1274.) After listening to the colloquy, Dr. Rotenberg, on redirect examination, testified that his view of the competence of Mr. Michael had been "strengthened." (Id. at 38, 755 A.2d 1274.) Dr. Rotenberg explained that Mr. Michael "showed himself to be lucid, coherent and somewhat manipulative, and so it showed him to be logical, coherent, non-depressed, non-psychotic, non-demented, and not suffering from any mental illness." (Id.)

At the conclusion of the hearing, the trial court found that there was "no mental health component" to Mr. Michael's decision to withdraw his appeal. The trial court explained:

> During the entire period of time [that] the Court has had frequent colloquies with the Defendant, such as the one we held today, we have always found that the Defendant is lucid in his responses. He is able to communicate, to understand the question and give an appropriate response, and, in fact, he even verbalized things beyond the basic question that the Court asked.
>
> We believe [that this is the] hallmark of someone who is not suffering from mental illness, but can understand the nature of the proceedings and participate in them fully and help counsel with the matter.

(Id. at 41, 755 A.2d 1274.)

The case then returned to the Pennsylvania Supreme Court. Noting that Mr. Michael was now asking the court to decide the merits of his appeal quickly, "essentially repudiating his request to withdraw the appeal," Michael II, 562 Pa. at 361, 755 A.2d 1274, the court elected to address all the issues raised in the proceeding. In an opinion issued on July 20, 2000, the court concluded that all claims were without merit. In particular, the court found that trial counsel had not been ineffective in failing to investigate and present indicia of Mr. Michael's alleged incompetency, explaining:

> The issue of Michael's competency has been litigated numerous times in numerous contexts during the prosecution of this case. He has failed to establish incompetency at any stage of this litigation, and has thus failed to meet his burden of proof....

Id. at 366, 755 A.2d 1274. With respect to claims pertaining to the failure to present mitigating evidence and effectively stipulating to a death penalty, the court wrote that "[c]ounsel was ethically obligated to abide by Michael's decision with regard to ... his refusal to present evidence of mitigation." Id. at 367, 755 A.2d 1274.[11]

On August 1, 2000, an application for re-argument was filed with the Pennsylvania Supreme Court on Mr. Michael's behalf. On October 18, 2000, counsel for the Commonwealth received a letter from Mr. Michael, stating:

> I understand that my death sentence was upheld by the Pennsylvania Supreme Court. This letter is to reiterate my position regarding the matter.
>
> The organization known as [CHCU] does not represent me in any capacity. Anything they file on my behalf is of their

[11] The Pennsylvania Supreme Court had previously ruled that an attorney has no duty to present evidence of mitigating circumstances when his client instructs him or her not to do so. See, e.g., Commonwealth v. Sam, 535 Pa. 350, 367-69, 635 A.2d 603, 611-12 (1993). It has also held that the trial court has no duty to compel production of evidence of mitigating circumstances, even where it has reason to believe that such evidence exists. Commonwealth v. Tedford, 523 Pa. 305, 338-40, 567 A.2d 610, 626-27 (1989). Federal courts have also ruled that a defense attorney is not obligated to present evidence of mitigating circumstances where the defendant knowingly and voluntarily elects not to present such evidence. See Singleton v. Lockhart, 962 F.2d 1315, 1321-22 (8th Cir.1992).

> own doing. I do not authorize them to act as my legal counsel.
>
> Furthermore, my state of mind is not an issue, as I am mentally competent. I mention this because I know [CHCU] is trying to use this issue as the basis of their defense.
>
> I am sending this letter to the Attorney General's office so that it may be forwarded to the proper court.

This letter was brought to the attention of the Pennsylvania Supreme Court. By Order dated January 10, 2001, re-argument was denied.

While the PCRA proceedings were pending, Mr Michael wrote to this Court on three separate occasions, asking that this Court refrain from granting any stay of execution. (Letters of April 15, 1997 (Dkt. Entry 53), July 9, 1997 (Dkt. Entry 54), and December 26, 2000 (Dkt. Entry 56).) In his letter of December 26, 2000, Mr. Michael wrote:

> I am satisfied with the sentence I have received in this matter. Furthermore, I am of sound mind as I type this letter to the courts. I was mentally competent at the time of the homicide, I was mentally competent when I pleaded guilty in court, and I am mentally competent at the present time.
>
> Any attorneys who claim to represent my best interests in court are not authorized by me to do so. These same attorneys may try to claim that I am not mentally competent. This is false information and severely tests the court's intelligence. As I

> pleaded guilty in court, the attorneys know that the "insanity issue" is the only avenue for them to pursue. However, in doing so they are deceiving the courts.

On January 25, 2001, the CHCU filed a motion to restore this case to active status, along with a request for 120 days within which to file a habeas corpus petition. (Dkt. Entry 57.) Respondents answered this motion with their own motion to remove present counsel and appoint new counsel due to a conflict of interest. (Dkt. Entry 59.) The basis for the Respondents' motion was Mr. Michael's letter of December 26, 2000, stating that the CHCU was not authorized to represent him. The CHCU responded to this motion by requesting that Mr. Michael be transferred to a federal mental health care facility for a 60-day evaluation for purposes of determining his competency. (Dkt. Entry 66.) The Respondents objected to transferring Mr. Michael to a federal mental health facility, requesting that any competency evaluation be conducted in the state institution where Mr. Michael was incarcerated. Respondents also argued that the PCRA court's competency decision was entitled to a presumption of correctness that stood unrebutted.

By Memorandum and Order filed on September 20, 2001, this Court ruled that the presumption of correctness ordinarily attaching to state court competency determinations, *see* Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990), should not be applied here because the PCRA court's determination was not reviewed by the Pennsylvania Supreme Court. (September 20, 2001 Memorandum at 12.) This Court explained that "to hold otherwise would mean that those persons who may seek to establish 'next friend' status based upon Michael's incompetency would be foreclosed from doing so by an incomplete adjudication in state court." (Id.) This Court also

rejected the CHCU's contention that commitment to a federal facility for purposes of a 60-day evaluation was required. Instead, Robert M. Wettstein, M.D., a board-certified psychiatrist and clinical professor in the Department of Psychiatry at the University of Pittsburgh School of Medicine, was appointed pursuant to Fed.R.Evid. 706. Specifically, Dr. Wettstein was appointed for the purpose of assisting this Court "in determining (1) whether Mr. Michael suffers from a mental disease, disorder or defect; (2) whether a mental disease, disorder or defect prevents Mr. Michael from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder or defect prevents Mr. Michael from making a rational choice among his options." (September 20, 2001 Memorandum at 18.) Dr. Wettstein was also requested to assist the Court "in determining whether Mr. Michael has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and a 'rational as well as factual understanding of the proceedings against him." ' (Id.) Dr. Wettstein was directed to conduct such examinations and testing of Mr. Michael at his place of incarceration as Dr. Wettstein deemed appropriate. Finally, Dr. Wettstein was asked to opine as to whether a competency evaluation could be made given conditions at Mr. Michael's place of incarceration and the level of his cooperation. (Id.)

On June 20, 2001, while the question of the proper procedural avenue for determining Mr. Michael's competence was pending before this Court, the CHCU filed a 146-page habeas corpus petition. (Dkt. Entry 78.) Mr. Michael did not sign the petition or otherwise endorse its filing.

On May 29, 2002, Dr. Wettstein submitted a comprehensive report. The report was based upon his review of the PCRA record concerning the competency question, including the testimony of mental health

experts; York County Prison records for 1994; state prison records for the period 1995 through 2001; letters written by Mr. Michael to this Court; [12] Mr. Michael's school records; an affidavit of Mr. Michael's sister dated August 28, 1996; an August 26, 1993 transcribed interview of Mr. Michael's brother; a psychiatric evaluation report prepared by Dr. Rotenberg; psychological test results; Dr. Crown's report; and the results of tests administered by Dr. Wettstein to Mr. Michael over the course of two days in December of 2001. The report also took into account the more than eight (8) hours of interviews of Mr. Michael conducted over two consecutive days. Dr. Wettstein concluded, with reasonable psychiatric certainty, that Mr. Michael is not suffering from any mental disease, disorder or defect, including any "cognitive dysfunction," which substantially adversely affects his ability to make a decision with regard to pursuing his legal appeals, and that Mr. Michael has the ability to consult with his attorneys with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him. Dr. Wettstein also concluded that "no substantial benefit would accrue to referring [Mr. Michael] for a 60 day psychiatric evaluation in a forensic psychiatric hospital...." (Dr. Wettstein Report at 18.)

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[12] Throughout the period of time that this matter has been pending with this Court, Mr. Michael has written to the Court to reiterate his position that he does not want to pursue a habeas corpus challenge to his conviction and sentence, and does not want to be represented by the CHCU. (E.g., Letters of March 6, 2001 (Dkt. Entry 65), May 3, 2001 (Dkt. Entry 75), August 13, 2001 (Dkt. Entry 83), December 3, 2001 (Dkt. Entry 88), April 3, 2002 (Dkt. Entry 90), January 14, 2003 (Dkt. Entry 128), March 10, 2003 (Dkt. Entry 132), April 14, 2003 (Dkt. Entry 133), May 28, 2003 (Dkt. Entry 134), September 15, 2003 (Dkt. Entry 135), and February 19, 2004 (Dkt. Entry 136).)

By Order entered on July 8, 2002, Attorney Joseph Cosgrove was appointed to represent the interests of Mr. Michael in this matter, and an evidentiary hearing concerning Dr. Wettstein's report was scheduled for September 26, 2002. (Dkt. Entry 102.) On the day of the hearing, the CHCU submitted a memorandum of law, asserting that "there is at least one claim in the Petition for Writ of Habeas Corpus that must be addressed by this Court without regard to Mr. Michael's stated wishes or the outcome of [the competency determination]." (Dkt. Entry 109.) The Respondents were directed to answer this memorandum, and the matter was taken under advisement. The question of Mr. Michael's competency proceeded to an evidentiary hearing on September 26, 2002.

The hearing began with this Court's colloquy of Mr. Michael. His responses to the Court's questions revealed a rational understanding of each inquiry. He acknowledged his right to proceed with this case, and that a possible outcome would be a new trial that could result in an acquittal or a sentence other than death. (9/26/02 Habeas Tr. at 9-10.) He also acknowledged that termination of this litigation would provide no assurance of the prompt execution of the death penalty, and that it may be years before he would be executed in any event. He also understood that a moratorium on the death penalty could be imposed, placing his sentence in limbo for a long time. (Id. at 10.) He also understood that, in light of the one-year statute of limitations on habeas corpus cases, a change of mind occurring in the future with respect to pursuit of a collateral attack on his conviction may be time-barred. (Id. at 12.) He confirmed his desire to not be represented by the CHCU. He reiterated that he wanted this proceeding terminated. (Id.) In response to the question as to why he wanted to dismiss counsel and abandon any challenge to his conviction, he explained

that he was not opposed to the death penalty. (Id. at 13.) In response to the court's inquiry concerning his written statement to the Pennsylvania Supreme Court that he wanted a decision on the appeal from the denial of his PCRA petition, Mr. Michael said that it was simply his intention to expedite the process. (Id. at 14-15.)

Dr. Wettstein's report was accepted as his direct testimony, and after brief inquiry by the Court, he was examined by CHCU counsel, respondents' attorney, and Attorney Cosgrove, appearing as counsel for Mr. Michael. The CHCU presented Dr. Krop as its sole witness.

At the request of the CHCU, a post-hearing briefing schedule was established. In its post-hearing brief, the CHCU essentially took the position that there was insufficient data on which to premise a competency determination, and urged once again that Mr. Michael be committed to a federal mental health facility for at least 60 days for observation and evaluation regarding his competency to discharge counsel and waive habeas corpus review. (Dkt. Entry 125.) Respondents' post-hearing brief strenuously objected to any further evaluation proceedings, and asked that Mr. Michael be found competent. Attorney Cosgrove, at the direction of Mr. Michael, filed a response on January 22, 2003, indicating that Mr. Michael "opposes the sixty (60) day mental health evaluation proposed by the [CHCU], and again asserts that he is mentally sound." The CHCU filed a reply brief on February 3, 2003, reiterating its position that "the Court should commit Mr. Michael to a federal mental health facility for long-term observation and evaluation." (Dkt. Entry 131 at 6.)

II. DISCUSSION

A. Competency to Forego a Collateral Challenge to a Conviction and Sentence

This case implicates case law precedent concerning a death-sentenced defendant's right to abandon a pending challenge to the conviction and/or sentence, e.g., Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), and requiring a putative next friend of the death row inmate to establish the inability of the death row inmate to appear on his own behalf to pursue the litigation. See Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). In Rees, the death-sentenced state court defendant directed his counsel to withdraw a petition for certiorari. The defendant's counsel informed the Court that he would not comply with this directive without a determination of his client's mental competency. The Court remanded the matter, instructing the trial court to determine whether the defendant had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. at 314. In Whitmore, the Court held that next friend standing is not available when it is shown that "the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded." 495 U.S. at 165. The Third Circuit has recognized that "the Whitmore standard is further illuminated by the Court's opinion in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 ... (1960) (per curiam), in which the Court considered the standard for determining competency to stand trial." White v. Horn (In re Heidnik), 112 F.3d 105, 111 (3d Cir.1997) (per curiam). In Dusky, the Court agreed with the

suggestion of the Solicitor General that the proper " 'test must be whether [the defendant] had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402. Thus, "Whitmore's reference to knowing, intelligent, and voluntary waiver [is not] divorced from the fundamental concept that underlies any notion of competency-that of rationality." In re Heidnik, 112 F.3d at 111 n. 6. The principles of *Rees*, *Whitmore* and *Dusky*, as explained in *Heidnik*, will be applied here.[13]

Courts in circumstances similar to those presented here have engaged in a three-part analysis:

> 1. Is the condemned inmate suffering from a mental disease, disorder or defect?
>
> 2. If the person is suffering from a mental disease, defect or disorder, does such condition prevent him from understanding his legal position and the options available to him?

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[13] In the next friend context, the burden of proof is placed on the party seeking to advance the cause of the death-sentenced inmate. See White v. Horn (In re Heidnik), 112 F.3d 105, 111 (3d Cir.1997). The burden is to "establish by clear evidence the inability of the death row inmate to appear on his own behalf to prosecute the action." Id. It is unclear whether this allocation of the burden of proof applies where the defendant seeks to discontinue a challenge to his conviction or sentence. In this case, allocation of burden of proof is not significant because it is clear that Mr. Michael is competent, and it is equally clear that commitment to a federal mental health facility for more evaluation is not warranted.

> 3. If the person is suffering from such a condition which does not prevent him from understanding his legal position and the options available to him, does that condition nevertheless prevent him from making a rational choice among his options?

See Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir.2000); Ford v. Haley, 195 F.3d 603, 615 (11th Cir.1999); Comer v. Stewart, 230 F.Supp.2d 1016, 1036-37 (D.Ariz.2002). If the death row inmate is found competent to waive a legal challenge to his conviction and sentence, the court must then ascertain that the waiver was not only rational, but also knowing and voluntary. See Fahy v. Horn, Civ. A. No. 99-5086, 2003 U.S. Dist. LEXIS 14742, at *60-61 (E.D.Pa. Aug.26, 2003) ("[C]ompetency to waive a right, and the question of whether the waiver was knowing and voluntary, are distinct inquiries.").

The Court-appointed expert, Dr. Wettstein, engaged in a comprehensive evaluative process to address the questions pertinent to a competency determination. He reviewed all relevant records, including previous psychiatric testimony and evaluations, as well as testimony presented in the PCRA case. He interviewed Mr. Michael for more than eight hours over a two-day period, and administered appropriate tests. The CHCU expert, Dr. Krop, acknowledged that Dr. Wettstein's interview and evaluation was "probably above and beyond what most mental health professionals need and do in terms of their evaluations." (10/21/02 Habeas Tr. at 53.) Dr. Wettstein's 18-page report details the information he learned upon review of the records, his mental status examination of Mr. Michael, the results of psychological testing, and his diagnosis. Employing the approach endorsed by the DSM-IV, published by the American Psychiatric Association, Dr. Wettstein diagnosed Mr. Michael as follows:

Axis I 1. Major depressive disorder singular or recurrent type in remission. 2. Polysubstance abuse disorder in full remission.

Axis II Antisocial, obsessive compulsive, and narcissistic personality traits.

Axis III Current medical problems include Hepatitis C.

Axis IV Current stressors include this litigation; prolonged incarceration on death row.

Axis V Current global assessment of functioning scale score of approximately 70, reflecting the absence of significant depressive or other symptoms of functional impairment.

(Dr. Wettstein Report at 14.)

Dr. Wettstein's report, accepted as his direct testimony in this matter (9/26/02 Habeas Tr. at 5), explained that the diagnosis of major depressive disorder was based upon a 1994 notation in the York County Prison records contemporaneous with the Benadryl overdose. Dr. Wettstein observed that the "depressive episode is not well characterized in the records, and the inmate did not receive psychiatric treatment following the suicide attempt." (Dr. Wettstein Report at 14.) He further explained that he found the major depressive disorder to be "in full remission given the current absence of significant symptoms or signs," adding that Mr. Michael "has never had a history of psychotic signs or symptoms, and no psychosis is evident at this time...." (Id. at 15.) Substance abuse

disorder was based upon a documented history of past substance use, even though denied by Mr. Michael, but was viewed in full remission because there was no evidence of any recent substance abuse. While noting that Mr. Michael exhibited a variety of personality traits of anti-social, narcissistic and obsessive compulsive types, Dr. Wettstein concluded that Michael did not meet the criteria of the specified personality disorders in DSM IV[14]. (Id.) As to his intellectual functioning, Dr. Wettstein found Mr. Michael "well within the average range, with better verbal than performance functioning." (Id.)

In his "CONCLUSIONS," Dr. Wettstein wrote:

> This 45 year-old single, white male was referred for psychiatric evaluation regarding his ability to waive further review of his conviction and death sentence for a homicide which occurred in 1993. He has not received any psychiatric or mental health treatment since being sent to state prison in 1995 except for an occasional sedative dose of Vistaril for bedtime sleep. He has not been a behavior problem while incarcerated at SCI Graterford and stated that he has had two minor misconducts without violence to other inmates or correctional officers.
>
> Although the inmate's siblings and

[14] As explained at page 686 of DSM-IV-TR:

Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself that are exhibited in a wide range of social and personal contexts. Only when personality traits are inflexible and maladaptive and cause significant functional impairment or subjective distress do they constitute Personality Disorders.

girlfriend have reportedly described him as periodically depressed prior to the homicide, there has been no evidence of persistent depressed mood or clinical depression subsequent to his July 1994 apparent suicide attempt by overdose at York County Prison. Some depressed mood was noted in April 2001 in Graterford during or after the course of his treatment with Interferon injections for Hepatitis C, but such depressive reactions are common during the course of that form of treatment, which ended in 2001. There was no subsequent evidence of clinical depression during the time of the present interviews. Instead, the inmate presented in the lengthy psychiatric interviews without sadness, tearfulness, slowing of his speech or thinking, rejection, suicide ideation, indecisiveness, loss of interest in activities, neglect of his physical health, or unusual social isolation. He not only denied the presence of depressive symptoms but showed no evidence of depressive signs in the interviews on an objective basis.

....

During the course of the psychiatric interviews, the inmate expressed clearly his desire to discontinue his legal appeals on their merits and stated his wish that the courts impose the death sentence as ordered in 1995 by the trial court. He repeatedly stated to me that he has no wish for a new trial or sentencing process, and even if they were imposed he would repeat his earlier guilty plea and waiver of

litigation. He does not believe that there was any ineffective assistance of counsel at his guilty plea and sentencing but was aware that an appellate court could disagree with his opinion. He is clearly aware that imposing a sentence of death will result in his death, and there is no delusional or unclear thinking of the consequences of a death ~~sen~~tence.... He was able to discuss these issues in a rational and coherent fashion without emotionality, impulsivity, confusion or indecisiveness.

Based upon the available information, it is my psychiatric opinion that the inmate, at the present time, has the mental capacity to understand the choice between life and death and can make a knowing and intelligent decision not to pursue further legal remedies. He fully comprehends the ramifications of his decision and has the ability to reason logically regarding these matters. He has the ability to manipulate information concerning the pursuit of his appeals, and has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation. The inmate understands his legal position and the options available to him.

....

It is my psychiatric opinion, with reasonable psychiatric certainty, that he is not suffering from a mental disease, mental disorder, or mental defect including any "cognitive dysfunction" which substantially adversely affects his

> ability to make a decision with regard to pursuing his legal appeal. Finally, it is my psychiatric opinion, with reasonable psychiatric certainty, that the defendant retains sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him.

(Id. at 15-16, 17, 18; emphasis added.)

Finally, Dr. Wettstein opined that psychiatric hospitalization as an aid in resolving this matter was not indicated. While acknowledging that "[e]ven a psychiatric evaluation over ten hours on two consecutive days will not identify every conceivable emotional and cognitive problem ...," Dr. Wettstein wrote that "the present evaluation is a good sample of the inmate's current functioning and that no substantial benefit would accrue to referring him for a sixty day psychiatric evaluation in a psychiatric hospital based upon his current clinical condition." (Id. at 18.) Dr. Wettstein further explained that he saw "no evidence of any emotional instability or lability during the interviews, and thus [saw] no indication for referral for psychiatric hospitalization as an aide in resolving this matter." (Id. at 18.)

After observing this Court's colloquy of Mr. Michael, Dr. Wettstein reiterated the conclusions expressed in his report and accepted as his direct testimony. (9/26/02 Habeas Tr. at 16-24.) In summary, Dr. Wettstein opined in response to the Court's questions that Mr. Michael is competent to waive counsel and dismiss his challenge to his conviction and sentence. (Id. at 23.)

Dr. Wettstein was cross-examined extensively by the CHCU concerning Mr. Michael's apparent

dissimulation, or "faking good," on test taking. He was also vigorously interrogated with respect to Mr. Michael's repeated denials of negative aspects of his life history. The CHCU argued with Dr. Wettstein that Mr. Michael was covering up his depression by denying occurrences that could produce depression, such as parental abuse and drug abuse.

The neutral and detached court-appointed expert, however, remained steadfast in his conclusion that Mr. Michael is not clinically depressed or undergoing a depressive episode:

> I do not see evidence for that. It may be, yes, that he has concealed from me some depressive symptoms, that's likely to be true, but his behavior, objectively and as I can infer it otherwise, is not consistent with someone who has, at least, a severe clinical depression. He was able to communicate well with me, that's not something you conceal from an examiner.
>
> His report of his functioning, in terms of his grooming and his exercise and his activity and his concern about health, that is not consistent with someone who has clinical depression at this time.

(9/26/02 Habeas Tr. at 70-71.) Dr. Wettstein was equally firm in his conclusion that Mr. Michael is not suicidal:

> [J]ust as in the case of many individuals who have severe terminal medical illnesses, they don't really wish to die but they believe they wish to be relieved of their suffering. So the same applies, I think, to Mr. Michael. He does not really wish to die, he is not clinically depressed,

> he is not suicidal, he does not really wish to die, but he wishes to be relieved of having to live on death row.
>
> ....
>
> If Mr. Michael were released to the streets today, he would not wish to die. However, he is not released to the streets and there's no immediate likelihood the he will be released to the streets, to my knowledge. His wish is not to remain on death row, because of quality of life issues, because he believes that the death penalty was appropriate in his case. So he wants to expedite the execution in his case. He does not wish to die, otherwise, he does not wish to remain for the rest of his life on death row or for the pendency of any appeals either.

(10/21/02 Habeas Tr. at 12-14.)

Dr. Wettstein explained that Mr. Michael's desire to discontinue legal challenges to his conviction and sentence was neither tantamount to a death wish nor the product of depression:

> I don't see [Mr. Michael's wish to discontinue his appeal] as mood-dependent, I don't see him as depressed, at this point in time. I see his functioning is good, in terms of self care, medical interest, activity, energy. I don't see, objectively, the presence of depression at this point.

(9/26/02 Habeas Tr. at 70.)

Dr. Wettstein further explained that Mr. Michael's desire to discontinue legal challenges was the product of a rational thought process:

> [Mr. Michael] indicated that he does favor the death penalty, and in his case, believes that the death penalty was an appropriate punishment, given the nature of the crime, and he indicated that if the tables were turned and he had been the victim rather than the perpetrator, then, that would be an appropriate sentence for that particular Defendant.

(10/21/02 Habeas Tr. at 7.) Dr. Wettstein also explained that his desire to be relieved of having to live on death row and feelings of guilt for the crime also provide rational bases for his desire to discontinue legal challenges. (Id. at 12.)

Dr. Wettstein's report and testimony afford an ample foundation for a conclusion that Mr. Michael "has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation...." Rees, 384 U.S. at 314. Dr. Wettstein's report and testimony also compel the conclusion that Mr. Michael possesses "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and ... has a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402.

The testimony of Dr. Krop, presented by the CHCU, does not undermine confidence in these conclusions. First, Dr. Krop last evaluated Mr. Michael in late 1996, at which time he found him competent. (10/21/02 Habeas Tr. at 83.) Second, Dr. Krop conceded that a decision to discontinue legal challenges to a death sentence can be the product of a rational thought process. (Id. at 80.) And third, while he

questioned Dr. Wettstein's conclusion that depression is in remission, he conceded that he had no independent data to suggest that Mr. Michael is currently depressed:

> Q. You have no independent data or anything to suggest that Mr. Michael currently is depressed, do you?
>
> A. That he is currently depressed, as of today?
>
> Q. Yes.
>
> A. No, I do not have data, as of today, or as of the time (Dr. Wettstein) made his decision.

(Id. at 81.)

Indeed, Dr. Krop did not opine that Mr. Michael lacks the capacity to appreciate his current position and make a rational choice to discontinue this litigation. Instead, Dr. Krop stated that he "can't rule out the possibility that he does not have the ability to make those rational decisions." (Id. at 52.) Dr. Krop testified that "in the abundance of caution," Mr. Michael should be transferred to a federal facility "which has mental health evaluators and has multidisciplinary teams available and the training and the expertise to conduct a competency evaluation or other types of psycholegal evaluation...." (Id. at 52.) Dr. Krop explained:

> I'm not questioning Dr. Wettstein's ability or capacity to make that determination [of competency], the only thing that I am, I believe, saying is that I believe that there is sufficient historical data, in combination with the data that Dr.

> Wettstein gathered from his own evaluation that certainly calls into question the need for more extensive evaluation.

....

> [W]hat my ultimate opinion is that there is sufficient data from Dr. Wettstein's evaluation and my own review of materials, including my own prior evaluation ..., to call into question Mr. Michael's competency to make the decisions in a rational manner, and what I am proposing or recommending to the Court is that a more extensive evaluation be conducted, which would allow larger samples of behavior than either Dr. Wettstein or I had available to us, that is to be done in a facility which will ... give a multidisciplinary team an opportunity to do more extensive testing, more observations in a more realistic kind of setting to truly make a determination as to the Defendant's mental state and how that mental state may affect ... his decisionmaking processes.

(Id. at 75, 77; emphasis added.)

Relying upon Dr. Krop's testimony, the CHCU argues:

> The evidence shows that Mr. Michael is or may be suffering from several mental diseases, disorders or defects which may substantially affect his capacity under *Rees:* (A) there are serious questions about whether his depression is truly in remission; (B) he may suffer from Post-Traumatic Stress Disorder; (C) he may

> suffer from Cognitive Disorder; and (D) he does suffer from Personality Disorder.[15]

(CHCU Post-Hearing Brief at 31.) The CHCU asserts that questions pertaining to Mr. Michael's mental health warrant his placement in federal custody for an extended period of observation and evaluation.

The CHCU's argument appears to proceed from the unsound premise that the possibility of a mental "disease, disorder or defect," or the possibility that such a defect substantially affects Mr. Michael's capacity, is sufficient under Rees, regardless of findings made as to Mr. Michael's competency. Other courts, however, have "rejected a construction of the Rees standard that first require[s] an inquiry into the capacity of the inmate to make the waiver decision, and then, if the inmate [is] found to have the capacity, to require an inquiry whether the inmate was 'suffering from a mental disease, disorder or defect which may substantially affect that capacity." ' Comer, 230 F.Supp.2d at 1036. As explained in Franklin ex rel. Berry v. Francis, 144 F.3d 429, 433 (6th Cir.1998):

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[15] Dr. Krop testified that he believed that a diagnosis of "personality disorder NOS," i.e., not otherwise specified, may be indicated. (10/21/02 Habeas Tr. at 48.) He also added, however, that his difference with Dr. Wettstein, who diagnosed only personality traits, was "just a matter of semantics...." (Id.) It should be noted that Dr. Rotenberg had diagnosed personality disorders, as opposed to Dr. Wettstein's diagnosis of personality traits. It appears, however, that the PCRA court rejected the diagnosis of personality disorder based on the CHCU's cross-examination of Dr. Rotenberg. (See Habeas Corpus Petition, (Dkt. Entry 78), at 61.) In any event, as explained in the text, the existence of a personality disorder would not compel a finding that Mr. Michael lacks the capacity to make a rational decision to abandon litigation over the death penalty.

> The [Rees] test is not conjunctive but rather is alternative. Either the condemned has the ability to make a rational choice with respect to proceeding *or* he does not have the capacity to waive his rights as a result of his mental disorder.

See also Smith v. Armontrout, 812 F.2d 1050, 1057 (8th Cir.1987) ("Though Rees recites these two portions of the standard as disjunctive alternatives, there is necessarily an area of overlap between the category of cases in which at the threshold we see a possibility that a decision is substantially affected by a mental disorder, disease, or defect, and that of cases in which, after proceeding further, we conclude that the decision is in fact the product of a rational thought process.").

In this case, Dr. Wettstein was unequivocal in his conclusion that Mr. Michael's desire to discontinue this case, expressed consistently for a number of years, is the product of a rational thought process. (9/26/02 Habeas Tr. at 22-24.) Dr. Wettstein was cross-examined extensively on the impact of Mr. Michael's dissimulation and avoidance, as well as the possibility of PTSD or a cognitive disorder, and remained unyielding in his opinions. Furthermore, he had the opportunity to listen to Dr. Krop's testimony. In response to the Court's questioning following Dr. Krop's testimony, Dr. Wettstein testified as follows:

> Q. [F]irst, as to Dr. Krop's testimony, concerning your diagnosis, and in particular, the Axis I diagnosis of depression in remission. As I understand that testimony, he questioned that diagnosis. Having heard Dr. Krop's testimony is it still your opinion that the diagnosis is appropriate?

> A. Yes, it is. I see no indication, at all, that Mr. Michael is depressed or has been depressed for a period of time, in terms of years.

(10/21/02 Habeas Tr. at 104-05.) Dr. Wettstein was also questioned why he remained confident in his diagnosis that depression was in remission in light of the results from the MMPI-2 test, which showed that Mr. Michael was dissimulating. Dr. Wettstein acknowledged that while the MMPI-2 results had to be considered with caution, they could not be regarded as invalid. (9/26/02 Habeas Tr. at 30-31.) At the conclusion of the proceedings, he elaborated:

> I look beyond the self-report of Mr. Michael, also, and his behavior. So I was particularly concerned about his grooming, about his attention to his health and about-through the medical records, there are many references, for instance, when the Hepatitis C issue arose, he was the one who requested the Hepatitis C testing.
>
> He was the one who requested treatment for Hepatitis. He is the one who requested treatment for diabetes, even though he doesn't have it. He is the one who has asked for regular testing and a diet. He is the one who has made all of these requests from the state for medical care. That is not, at all, consistent with someone who is seriously depressed by any means. People, typically, who are depressed, neglect their health, neglect their self care. They do not exercise, in the way that Mr. Michael exercises. He told me, for instance, and I didn't write this in

> the report, that he utilizes all of his exercise at yard time. He does a thousand sit ups in the course of an hour. Now, I've never heard of a depressed person, seriously depressed person interested in doing that kind of exercise on a regular basis.

(10/21/02 Habeas Tr. at 105-06.) Dr. Wettstein elaborated that it was not only the fact of these behaviors of Mr. Michael, but also their duration, that buttressed his conclusion that Mr. Michael's capacity to understand his situation and make a rational decision is not impaired by depression.

The CHCU points out that attention to personal hygiene, exercise, and health does not necessarily foreclose a diagnosis of depression. It cannot be seriously disputed, however, that a psychiatrist may rely on such factors in making the overall assessment that a particular person is not depressed.

Even the existence of an active depressive episode would not preclude a finding of competency: "My testimony is that even if he were depressed, that doesn't automatically mean he is unable to or incompetent to waive his appeals." (10/21/02 Habeas Tr. at 28.) Dr. Krop acknowledged "that even if possible personality traits or disorders and possible cognitive dysfunction, ... were present, and even after some period of time that he was seen and those were diagnosed, [Mr. Michael] could still be competent to waive counsel and waive further appeals." (Id. at 85.)

Case law confirms that, in determining competency, the existence of a mental disease or disorder is not dispositive. See Ford v.. Haley, 195 F.3d 603, 617 (11th Cir.1999) (fact that death row inmate suffered from depression and a personality disorder did not render clearly erroneous district court's finding that

the death row inmate was competent to dismiss his habeas petition and counsel); Fahy, 2003 U.S. Dist. LEXIS 14742, at *61-62 (fact that defendant may have been "acutely psychiatrically ill" did not preclude the district court from finding him competent); White v. Horn, 54 F.Supp.2d 457, 468 (E.D.Pa.1999) (diagnosis of schizophrenia not incompatible with a conclusion of competency). That a person may suffer from a mental disorder, "without more, is wholly insufficient to meet the legal standard that the Supreme Court has laid down for this kind of case." Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir.1988). Nor does the mere disagreement of mental health experts prevent a court from finding the death-sentenced inmate competent. See Smith, 812 F.2d at 1057-59.

This Court, in its Memorandum Opinion of September 20, 2001, observed that, to the extent that authority exists to order a sovereign state to surrender a death-sentenced inmate to a federal facility for purposes of a competency evaluation, "such authority should be exercised sparingly, informed by the considered opinion of qualified professionals." (September 20, 2001 Memorandum (Dkt. Entry 80) at 16.) This Court's charge to Dr. Wettstein included advising the Court whether an appropriate competency evaluation necessitated removing Mr. Michael from state custody and sending him to a federal mental health facility. In his report, as well as in his testimony, Dr. Wettstein opined that such action was not required. The conclusion was reiterated after Dr. Krop's testimony. (10/21/02 Habeas Tr. at 107.)

Dr. Wettstein was appointed by this Court to inform its decision on this important matter. He thus stands as neutral expert witness. In light of Dr. Krop's retention by the CHCU (who appear to take the position that any decision to abandon litigation must not be the product of a rational thought process, a position inconsistent with prevailing precedent), his opinion is

appropriately viewed with a measure of skepticism.[16] There was no evidence of possible bias on the part of Dr. Wettstein. In fact, prior to this proceeding, Dr. Wettstein had testified only on behalf of the defense in death penalty cases. (9/26/02 Habeas Tr. at 16-17.) There can also be no dispute about Dr. Wettstein's qualifications. He is exceptionally well-qualified to opine on the matters before the Court. Moreover, his opinions were premised on extensive testing and interviews over a two-day period, as well as careful consideration of a large amount of materials. By no means can his review be considered perfunctory. Under these circumstances, I find his opinions credible and reliable.

A sovereign state should be required to surrender custody of a death-sentenced inmate only where there is a compelling showing of the need to do so. In the face of the credible, reliable, unequivocal, and essentially unrebutted opinion of the court-appointed

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[16] Circumspection with respect to Dr. Krop's call for an extended evaluation period is also warranted due to the fact that he found Mr. Michael competent at the end of 1996. This opinion was rendered closer in time to Mr. Michael's apparent suicide attempt in 1994. In 1995, MMPI test results indicated that Mr. Michael endorsed depressive symptoms. (9/26/02 Habeas Tr. at 60-61.) Yet, apparently because Mr. Michael had authorized pursuit of the PCRA proceedings in 1996, Dr. Krop found him competent. As noted above, Dr. Krop found in 1996 that Mr. Michael had the capacity to consult with his lawyers, stating that "the capacity to communicate with an attorney and relate is one of the more significant issues with regard to the competency criteria." (12/30/96 PCRA Tr. at 186.) No evidence has been presented that Mr. Michael lacked the capacity when he testified before this Court that he wants to end these proceedings, and Dr. Wettstein found that such capacity is and has been present. It thus appears that Dr. Krop's opinion may be result-oriented: Mr. Michael is competent only when allowing others to pursue challenges to his conviction and sentence.

expert, no such showing has been made here.[17] Neither referral to a federal mental health facility nor additional testing is required to render an adjudication on Mr. Michael's competency.

Based upon Dr. Wettstein's report and testimony, the exhibits introduced during the two-day evidentiary hearing conducted in this matter, and this Court's colloquy of Mr. Michael, the following findings of fact are made:

- Mr. Michael does not presently suffer from a mental disease, disorder or defect.

- Mr. Michael has the emotional, intellectual and psychiatric capacity to understand his legal position and the options available to him.

- No mental disease, defect or disorder prevents Mr. Michael from understanding his legal position and available options.

- No mental disease, defect or disorder precludes Mr. Michael from making a rational choice among his options.

- Mr. Michael has sufficient present ability to consult with his lawyers with a rational as well as a factual understanding of these proceedings.

- Mr. Michael is competent to dismiss the CHCU as counsel and dismiss this collateral challenge to his conviction and sentence.

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[17] As noted above, Dr. Wettstein testified that Mr. Michael has the capacity to make an informed and rational decision. Kr. Krop did not testify that Mr. Michael lacked such capacity.

This Court also finds that Mr. Michael's decisions are knowing, rational and voluntary. "A waiver is voluntary if, under the totality of the circumstances, [it] was the product of a free and deliberate choice rather than coercion or improper inducement." Fahy, 2003 U.S. Dist. LEXIS 14742, at *62. Stated otherwise, "a decision is involuntary if it stems from coercion, whether mental or physical." Id.

There is no evidence in this case that the conditions of Mr. Michael's death-row confinement are so harsh that his decision can be viewed as the product of coercion. Moreover, the decision has been consistently repeated to this Court over a number of years. It is thus not the product of uncontrollable impulsivity. Dr. Krop, himself, acknowledged that the consistency of Mr. Michael's position in this Court "is an indication of an absence of impulsive behavior...." (10/21/02 Habeas Tr. at 79.) Mr. Michael's decision "is not the result of an overborne will or the product of an impaired self-determination brought on by the exertion of any improper influences." Comer, 230 F.Supp.2d at 1071.

Mr. Michael has provided a rational explanation for his desire to discontinue this litigation: his approval of the death penalty as an appropriate punishment for murder, his admission that the murder of Ms. Eng qualifies for the death penalty, his feelings of remorse, and his dissatisfaction with the prospect of life in prison. Similar explanations for electing to forego challenges to convictions and death sentences have been accepted as rational in similar contexts. See, e.g., Devetsco v. Horn (In re Zettlemoyer), 53 F.3d 24, 27-28 (3d Cir.1995); Comer, 230 F.Supp.2d at 1063; United States v. Hammer, 25 F.Supp.2d 518, 525-28 (M.D.Pa.1998). Accordingly, Mr. Michael's waiver of his right to pursue this case is knowing, rational and voluntary.

B. The "Non-Waivable" Claim.

The CHCU maintains that, despite Mr. Michael's competent choice to discharge it as his counsel, this Court must nonetheless adjudicate a claim styled by the CHCU as "collusion" of the trial court, defense counsel and prosecutor to arrange for the death sentence because Mr. Michael wanted it. Contrary to the CHCU's assertion, this Court lacks the authority to adjudicate this claim.

In Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976), the Court held that where, as here, a death-sentenced inmate has competently, knowingly, and intelligently elected to forego legal challenges to his conviction and sentence, a federal court is without jurisdiction to consider any claim advanced on behalf of the death-sentenced inmate by another. In dismissing the matter for want of jurisdiction, the majority specifically rejected the type of argument advanced by the CHCU here-that the inmate was "unable" as a matter of law to waive the right to review.

Gilmore was followed by Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). At issue in Whitmore was "whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forego his right of appeal to the State Supreme Court." Id. at 151. The essence of the third-party's contention was that a state must provide appellate review of a conviction and sentence before it can proceed to execute a person. Id. at 154. Chief Justice Rehnquist explained that "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." Id. Chief Justice Rehnquist elaborated that the "threshold inquiry into standing 'in no way depends on the merits of the [petitioner's] contention

that particular conduct is illegal,'...." Id. at 155 (emphasis added). In finding standing to be lacking, the Court rejected the contention that t he public interest in enforcing the Eighth Amendment was sufficient to allow the suit to proceed in federal court. Chief Justice Rehnquist wrote that "[t]his allegation raises only the 'generalized interest of all citizens in constitutional governance,' and is an inadequate basis on which to grant ... standing to proceed." Id. at 160 (citation omitted). Moreover, "[t]he uniqueness of the death penalty and society's interest in its proper imposition" did not "justify a relaxed application of standing principles." Id. at 161.

Later in the same term in which Whitmore was decided, the Court held that a federal habeas corpus court was without jurisdiction to enter a stay of execution where a state court, following a hearing, found the defendant competent to waive his right to seek post-conviction review. In light of the state court competency determination, the Court found that there was absent "an adequate basis ... for the exercise of federal power." Demosthenes v. Baal, 495 U.S. 731, 737, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990).

More recently, the Third Circuit has rejected the notion of a non-waivable claim that may be pursued by someone other than a death sentenced inmate who is competent and has knowingly and voluntarily waived legal challenges to his conviction and sentence. United States v. Hammer, 226 F.3d 229 (3d Cir.2000). At issue in *Hammer* was whether a death-sentenced defendant could forego a direct appeal from a death sentence imposed under the Federal Death Penalty Statute, 18 U.S.C. § § 3591-98. In the course of holding that the competent death-sentenced inmate could dismiss the appeal, the unanimous panel observed that "it does not appear that any other person has a legally-cognizable interest in these proceedings." Hammer, 226 F.3d at 237.

In the face of this authority, the CHCU has mustered only a twice-reversed decision of a district judge, United States v. Davis, 150 F.Supp.2d 918 (E.D.La.2001), and 180 F.Supp.2d 797 (E.D.La.2001), rev'd, 285 F.3d 378 (5th Cir.2002), cert . denied, White v. United States, 537 U.S. 1066, 123 S.Ct. 618, 154 L.Ed.2d 555 (2002), and a Pennsylvania Supreme Court decision, Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Regardless of the merits of those decisions, they have no bearing on the threshold question of standing being presented here. *McKenna,* in which the court undertook to address the constitutionality of the Pennsylvania death penalty law even though the defendant declined to raise the challenge, was decided under state law. *Davis* dealt with the right to waive counsel at the death penalty phase of a case, a right that was twice-enforced by a majority of the Fifth Circuit by way of writs of mandamus.[18] Davis does not address the question of a "non-waivable" claim in the context of a federal court collateral review of a state court conviction.

In this regard, it bears noting that the so-called non-waivable claim was presented to and considered by the Pennsylvania Supreme Court in connection with the appeal taken from the PCRA proceedings. The Pennsylvania Supreme Court, quoting from the CHCU brief, stated that one of the issues before it is "whether the stipulated-to death penalty is constitutionally unreliable." Michael II, 562 Pa. at 361 n. 1, 755 A.2d 1274. The court also noted that the CHCU contended that a "stipulation that there was no mitigating factors was a knowingly false representation...." Id. at 366, 755

[18] Only one of the Fifth Circuit decisions appears to have been published, but it is clear that the Fifth Circuit twice instructed the District Court that the defendant could waive counsel at the penalty phase of his murder prosecution.

A.2d 1274. Having acknowledged these contentions, the court ruled that counsel for Mr. Michael was bound to accept his direction not to present mitigating evidence, and that there existed no precedent that required a defendant to present mitigating evidence. Id. at 367-68, 755 A.2d 1274. Thus, the CHCU has had an opportunity to litigate the "non-waivable" claim.

In any event, as noted above, standing "in no way depends on the merits of the ... contention that particular conduct is illegal." Whitmore, 495 U.S. at 155. Where, as here, a death-sentenced inmate is found to be competent and has knowingly and voluntarily waived federal habeas corpus review, a federal court is without power to act in the matter. See In re Zettlemoyer, 53 F.3d at 28; Smith, 812 F.2d at 1059.

III. CONCLUSION

To determine whether Mr. Michael is competent to decide to dismiss counsel and this habeas corpus proceeding, this Court sought to provide "a constitutionally adequate fact-finding inquiry to make a reliable determination...." Mata v. Johnson, 210 F.3d 324, 327 (5th Cir.2000). That process included (1) a current examination by a highly qualified expert, (2) an opportunity for the parties to present pertinent evidence, and (3) an examination of Mr. Michael in open court concerning his decision to waive further proceedings. For purposes of this proceeding, Mr. Michael was also appointed independent counsel.

Throughout these proceedings, Mr. Michael has maintained the consistent position that he does not seek federal court intervention with respect to his conviction and sentence. Having found, without hesitation, that Mr. Michael is competent, and has made a knowing, rational and voluntary decision, this Court has no choice but to honor that decision. As did

the death-sentenced inmate in Comer, Mr. Michael "has made a competent and free choice, which 'is merely an example of doing what you want to do, embodied in the word liberty.'" '230 F.Supp.2d at 1072. Also worth reiterating here is the Eleventh Circuit's admonition in Sanchez-Velasco v. Sec'y of the Dep't of Corr., 287 F.3d 1015, 1033 (11th Cir.2002), affirming a district court's finding that a defendant competently, knowingly and voluntarily waived federal court collateral review:

> [W]e should not forget the values that motivated the Supreme Court's Whitmore decision and what is really at stake in these kind of cases. These cases are about the right of self-determination and freedom to make fundamental choices affecting one's life.... [A] death row inmate ... does not have many choices left. One choice the law does give him is whether to fight the death sentence he is under or accede to it. Sanchez-Velasco, who is mentally competent to make that choice, has decided not to contest his death sentence any further. He has the right to make that choice.... He has never asked [Capital Collateral Regional Counsel] to represent him or consented to have them do so. He has directed them to leave his case alone, and the law will enforce that directive.

Likewise, this Court has no choice but to enforce Mr. Michael's knowing, rational and voluntary directive that legal challenges to his conviction and sentence cease.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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United States District Court,
Middle District Pennsylvania.

HUBERT L. MICHAEL	:
Petitioner	:
v.	:
MARTIN HORN,	:No. 3:CV-96-1554
Commissioner, Pennsylvania	:
Dep't of Corrections;	:
Donald T. Vaughn,	:
Superintendent of the	:
State Correctional Institution	:
at Graterford; Joseph P.	:
Mazurkiewicz, Superintendent:	
of the State Correctional	:
Institution at Rockview	:
Respondents	:

ORDER

NOW, THIS 10th DAY OF MARCH, 2004, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT**:

1. The Defender Association of Philadelphia, Capital Habeas Corpus Unit, its successors or assigns, David Wycoff, Esq., Michael Wiseman, Esq., and any other attorneys of the Capital Habeas Corpus Unit are dismissed as counsel for Hubert L. Michael.

2. Joseph M. Cosgrove, Esq. is directed to send a copy of this Memorandum and Order to Mr. Michael, and is dismissed as counsel for Hubert L. Michael.

3. Hubert L. Michael's motion to dismiss the habeas corpus petition filed in this matter is **GRANTED**.

4. The stay of execution previously imposed by this Court's Order of August 22, 1996 is **VACATED**.

5. The Clerk of Court is directed to mark this matter **CLOSED**.

s/Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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ORIGINAL

Supreme Court, U.S.
FILED
JAN 2 2 2007
OFFICE OF THE CLERK

NO. 06-710

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DAVID DIGUGLIELMO, Superintendent State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent State Correctional Institution at Rockview,

Petitioners,

v.

HUBERT L. MICHAEL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. COSGROVE
1460 Wyoming Avenue
Forty Fort, PA 18704
570-287-0921

Counsel for Hubert L. Michael

Dated: January 22, 2007

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Have Petitioners shown that this case is of such imperative public importance as to require immediate review in this Court of the interlocutory order of the United States Court of Appeals for the Third Circuit, which remanded the case to the District Court in order to assess Mr. Michael's competence, where the Third Circuit found substantial reasons for requiring reassessment of his competence?

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CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III 9

For the reasons stated below, this Court should deny the petition for writ of certiorari, which requests review of an interlocutory order of the United States Court of Appeals for the Third Circuit, but fails utterly to show that the "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," as required by Supreme Court Rule 11.[1]

COUNTER-STATEMENT OF THE CASE

Respondent Hubert L. Michael was sentenced to death after waiving his right to trial and pleading guilty to the charge of first degree murder. Mr. Michael had previously rejected an offer from the Commonwealth of a life sentence in exchange for a plea of guilt. Six days after pleading guilty, Mr. Michael attempted to withdraw his plea. This was the first of many instances in which Mr. Michael has made a critical litigation decision and then changed his mind or tried to change his mind.

Trial counsel knew or should have known that Mr. Michael was depressed; that he had a history of mood swings and social isolation; that he had been unable to communicate with counsel about the case; and that Mr. Michael's mental health and history were therefore important areas to investigate, both with respect to potential mitigating evidence and with respect to Mr. Michael's competency. Immediately prior to the capital sentencing proceeding – with no inquiry into competency having taken place – Mr. Michael announced that he intended to present no evidence. When the trial court advised Respondent that this would likely lead to imposition of a sentence of death, Mr. Michael purportedly acknowledged that he understood, to which the

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[1]The petition for writ of certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

court responded: "[I]f you want the death penalty, ... we can arrange it for you."

Mr. Michael has continued to vacillate about whether and how to litigate throughout this case, from the original effort to withdraw his guilty plea to several requests – later rescinded – to proceed without counsel and have his death sentence carried out. While Mr. Michael has at times both authorized counsel to represent him and then attempted to withdraw such authorizations regarding various efforts of counsel on his behalf, Mr. Michael has ultimately authorized the actions taken on his behalf to perfect the litigation at each level of this case. This is true of the direct appeal of his sentence to the Pennsylvania Supreme Court (a review which is nonetheless mandated by statute, 42 Pa. C.S. § 9711), as well as the state post-conviction proceedings, and ultimately, the federal habeas petition and appeal of the District Court's order.[2]

After denial of his post-conviction petition by the Pennsylvania courts, Mr. Michael endorsed the habeas petition previously filed on his behalf by his prior counsel from the Defender Association of Philadelphia, Federal Habeas Corpus Unit (Defender Association). This acceptance by Mr. Michael yet again followed his vacillation between challenging his conviction and sentence, or withdrawing his appeals. Each time, when pressed on the matter, Mr. Michael embraced and continued to pursue the litigation.[3]

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[2]On appeal of the denial of post-conviction relief, Mr. Michael sent an affidavit to the Pennsylvania Supreme Court requesting that his appeal be withdrawn. After a remand for competency proceedings, Mr. Michael "filed a new affidavit in which he asked [the Pennsylvania Supreme Court] to decide the merits of his PCRA appeal quickly, essentially repudiating his request to withdraw the appeal." Commonwealth v. Michael, 755 A.2d 1274, 1276 (Pa. 2000). The Pennsylvania Supreme Court proceeded to review the merits of his claims.

[3]Determining whether Mr. Michael's serial vacillation is the result of a mental illness sufficiently severe to render him incompetent is the reason for the Third Circuit's remand for a competency evaluation. At oral argument before the Circuit, even counsel for the Commonwealth acknowledged that mental health issues were "[a]bsolutely" present in this case.

Before the District Court, however, Mr. Michael thereafter assumed another posture, requesting dismissal of the petition. Undersigned was appointed by the District Court to represent Mr. Michael's interests, while the Defender Association lawyers remained counsel of record. Those lawyers had asked the District Court, prior to undersigned's appointment, to order a mental health evaluation of Mr. Michael, which the Court granted. This evaluation was conducted by the Court's own expert, Dr. Robert Wettstein. After undersigned's appointment, a hearing was held to determine Mr. Michael's competence to waive his habeas rights.

On March 10, 2004, the District Court issued its order finding Mr. Michael competent, and dismissed the habeas petition. The District Court's finding, indeed, was based almost entirely on the testimony of Dr. Wettstein. The District Court went further, however, dismissing not only the Defender Association, but *also* dismissing undersigned as counsel for Mr. Michael as well – something Mr. Michael had not requested then and, to present, does not seek. This left Mr. Michael without counsel, in violation of 21 U.S.C. § 848 (repealed, now found at 18 U.S.C. § 3599). The Defender Association filed an appeal to the Third Circuit, to which the Commonwealth responded by seeking dismissal. The Third Circuit provisionally granted dismissal, but allowed Mr. Michael ten days to respond and indicate whether he wished to proceed with the appeal. The very next day, Mr. Michael signed a statement requested by the Court, advising that he *did* wish to pursue the appeal and further asking that the undersigned be appointed to represent him.[4]

After oral argument, the Third Circuit granted a certificate of appealability on the

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[4]Indeed, while Mr. Michael has sent a number of letters to the Third Circuit during the course of these proceedings, he has repeatedly asserted that he wants undersigned to remain as his counsel.

question of whether the District Court had erred in dismissing ***all*** counsel for Mr. Michael in its March 2004 order. Immediately prior to this, Dr. Wettstein, the District Court's expert, addressed a letter to the Court calling into question the District Court's competency finding, which was premised on Dr. Wettstein's determination of Mr. Michael's "steadfastness" in wanting to terminate all challenges to his conviction and death sentence. Given Mr. Michael's approval of the appeal to the Third Circuit, Dr. Wettstein indicated that his prior finding was now in question, and that Mr. Michael's "mental state needs further exploration."[5] After oral argument, Mr. Michael once again sent a series of letters to the Court, in which he again vacillated on the question of how (if at all) and to what extent he wished to challenge his conviction and sentence.[6]

The original decision of the Circuit granting a certificate of appealability ("COA") was issued after this series of letters in June of 2005. The Third Circuit ruled that since Respondent was then represented by counsel his letters were of no moment, and the matter was therefore remanded to the District Court for consideration of the merits of the habeas petition. After initially denying rehearing, however, the Third Circuit withdrew the mandate and held a second oral argument on the appeal. The Third Circuit then issued a nonfinal, interlocutory decision

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[5]Thereafter, Dr. Wettstein wrote two additional letters to the Court, in which he again raised concerns that the original finding of competence was in question, given Mr. Michael's repeated vacillations, and suggested the need for further evaluation of Mr. Michael's competence.

[6]For example, in January 2006, Mr. Michael wrote that he wanted undersigned counsel to remain as his lawyer "for the duration of this matter." In February 2006, he wrote that he wanted the undersigned to represent him "as long as I am before any court regarding any criminal matter." While he indicated that he did not want further appeals of his death sentence, he did not ask for all of his appeals – which also challenge his convictions – to be withdrawn. Mr. Michael has not written to any of the federal courts since the Third Circuit's remand order.

remanding this matter to the District Court for further evaluation of Mr. Michael's competence.

The Third Circuit was well aware that a competent defendant – including one under sentence of death – may dismiss his appeals. Critical to the Third Circuit's decision to remand, therefore, were the following facts: (1) Dr. Wettstein's "report and testimony were the bases for the District Court's competency finding"; and (2) Dr. Wettstein "subsequently has thrice taken the position that Michael should be reevaluated." Michael v. Horn, 459 F.3d 411, 419 (3d Cir. 2006). Given Dr. Wettstein's desire for further evaluation of Mr. Michael's competence, the Third Circuit found as a factual matter that there was "a 'substantial reason' not to presume continuing competency here." Id. (quoting Smith v. Armontrout, 865 F.2d 1502, 1505 (8th Cir. 1988) (en banc)). Accordingly, the Third Circuit found there were doubts as to Mr. Michael's competence, and remanded to the District Court "to determine if Michael is competent to make the decision to dismiss the appeal." Michael, 459 F.3d at 420.[7]

[7]Judge Greenberg, who had dissented from the panel's earlier decision to remand the case for consideration of the merits, concurred in the remand order. Id. at 421.

REASONS FOR DENYING THE WRIT

THE COMMONWEALTH HAS FAILED TO SHOW ANY SUBSTANTIAL BASIS, LET ALONE A REASON OF IMPERATIVE PUBLIC IMPORTANCE, TO REVIEW THE THIRD CIRCUIT'S INTERLOCUTORY ORDER.

The Commonwealth seeks certiorari review of an order that is not final and does not satisfy the requirements for review of interlocutory decisions. Moreover, the Commonwealth asks this Court to address questions that are not even addressed in that interlocutory order, but are at best ancillary to the merits of the substantive issues yet unresolved at the circuit level. The Commonwealth, though, has utterly failed to show any reason why this Court should intervene in the ongoing litigation at this time.

As indicated in the *Petition*, in this *Brief in Opposition*, and in the rulings by both the District Court and the Third Circuit, Mr. Michael's vacillating mental state and vacillating desires about the habeas litigation and appeals have complicated efforts to reach an appropriate resolution of this case. Faced with that situation, the Third Circuit panel – after grappling with it for some time – unanimously decided that the appropriate step to take at this time is a remand to the District Court for a reevaluation of Mr. Michael's competence. The Third Circuit emphasized that in doing so, it was not ruling on other asserted grounds to dismiss the appeal, or on the underlying issue on which it granted COA in the first place. Michael v. Horn, 459 F.3d at 420.

Rather than await the District Court's determination of Mr. Michael's competence and desires with respect to the appeal, or any final ruling by the Third Circuit on the merits of the appeal if it is not dismissed, the Commonwealth seeks immediate intervention by this Court.

Such intervention is rarely countenanced by this Court. As Supreme Court Rule 11 plainly states, review of an interlocutory order of a court of appeals "will be granted only upon a showing that the case is of *such imperative public importance* as to justify deviation from normal appellate practice and to require *immediate* determination in this Court."[8]

The Commonwealth has not even attempted to make such a showing. Indeed, the Commonwealth has failed to present any question worthy of this Court's resolution.

The questions presented in the *Petition* gloss over the fact that when the Court of Appeals asked Mr. Michael whether he wanted the appeal of the District Court's order dismissing his petition, he stated that he did want the appeal, and sought appointment of undersigned as his counsel (as noted above, with dismissal of undersigned and the lawyers from the Defender Association, the District Court's order had left Respondent "counsel-less" in the wake of the dismissal of his habeas petition). The Commonwealth's suggested "questions" for review thus mischaracterize Mr. Michael's response to the District Court's order, given his stated wish to have that decision reviewed.

The Commonwealth's questions also ignore the issues raised by Mr. Michael's multiple vacillations concerning just what, how and with whom he wishes to proceed. The Commonwealth ignores Mr. Michael's bewildering flip-flops in its effort to have this Court review a decision which is not ripe for such, and further ignores the reasons for the decision of the Circuit to remand, i.e., to address the questions raised by the District Court's own expert that

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[8]See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court").

his prior opinion may now be in question. The petition for writ of certiorari should therefore be denied.

The questions raised by the Commonwealth in the *Petition* do not even take issue with the interlocutory order of the Third Circuit itself, but rather with *prior* interlocutory rulings by that Court. In fact, both questions raised by the Commonwealth are irrelevant to the latest order of the Third Circuit, which is ostensibly at issue. For example, the first question which the Commonwealth seeks to present for certiorari review has to do with whether the Circuit should have "entertain[ed]" Respondent's appeal, given the finding of competence and waiver by the District Court, and the supposed "objection" of Mr. Michael to the filing of this appeal.[9]

Because of the factual, legal and procedural complexities of the appeal, the Third Circuit has considered multiple submissions by the parties, and has heard oral argument twice on the appeal. It has now decided that its resolution of the appeal would be furthered by a limited remand to the District Court. Nothing in the Commonwealth's submission suggests *any* reason to think that this Court is in a better position than the Third Circuit to untangle these complexities, or that there is *any* need for immediate resolution of these questions by this Court (particularly since this is an issue that has been present in the case since the Third Circuit first decided to consider the appeal).

Likewise, the second question presented by the Commonwealth criticizes the Circuit's grant of a certificate of appealability, which occurred in the summer of 2004. Neither of these

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[9]The Commonwealth conveniently ignores the fact that the District Court order not only left Mr. Michael without counsel at a critical time in the habeas/appellate process, but that within hours of the Third Circuit's invitation, Mr. Michael embraced the appeal as his own and asked for appointment of undersigned as his counsel to advance that appeal.

decisions, which were obviously interlocutory, were challenged at the time by the Commonwealth through the certiorari process (nor should they have been). There is nothing about the remand order in question that has suddenly made those questions more important, or more in need of immediate resolution by this Court now.

The same is true of the reasons advanced by the Commonwealth for granting the writ in the body of the *Petition*. The Commonwealth first asserts that the Third Circuit's decision to remand for an evaluation of competence runs contrary to this Court's decisions in Whitmore v. Arkansas, 495 U.S. 149 (1990), and Demosthenes v. Baal, 495 U.S. 731 (1990).

In fact, however, there is no inconsistency between the interlocutory order of the Third Circuit and the decisions in those cases. Both Whitmore and Baal dealt with the question of Article III jurisdiction to hear "next friend" filings, an issue which has nothing to do with the Third Circuit's ruling. Moreover, in this case the Third Circuit has determined that there is a "substantial question" as to Mr. Michael's current competency and as to whether, if competent, he wishes the appeal to go forward. Michael v. Horn, 459 F.3d at 419-21. Nowhere in its opinion, however, did the unanimous Third Circuit question in any way the underlying principle that a competent defendant who wishes to do so may dismiss his appeal, even if the result of such a decision is the defendant's execution. Rather, consistent with this Court's decision in Rees v. Peyton, 384 U.S. 312, 314 (1966), the Third Circuit seeks only to determine whether Mr. Michael, *at present*, has the "capacity to make an intelligent decision" about his pending appeals. The non-existent "conflict" with Whitmore, Baal or the decisions of other circuits is no basis for this Court to grant certiorari review of the Third Circuit's interlocutory ruling.

Accordingly, it strains credulity to suggest that the order in question below somehow runs

afoul of decisions of this Court on entirely different issues. The Third Circuit's interlocutory decision does nothing to prejudice the Commonwealth, and addresses only that need, affirmed by this Court in Rees, that federal courts be sure of a litigant's competence before ruling on ultimate matters such as whether his right to habeas review should evaporate, or his life end without exercise of such review by the judiciary. For these reasons, as well as those mentioned above, certiorari should be denied.

Similarly, the second reason presented by the Commonwealth for granting certiorari is to correct a purported error by the Third Circuit in granting COA. *Petition*, at 16-18. In no way does the Third Circuit's supposed error in granting COA raise an issue worthy of this Court's certiorari review. Seemingly grasping at straws, the Commonwealth goes so far as to suggest that this Court should grant certiorari to tell the Third Circuit that it erred in its 2005 ruling, which the Third Circuit itself has since vacated. *Petition*, at 17 & n.8. This Court does not take cases merely for the purpose of correcting errors, much less for the purpose of correcting errors in interlocutory rulings, and still less (if possible) to correct errors in an interlocutory order that a lower court has already vacated. The Commonwealth's request that it should do so is unworthy of the requested grant.

CONCLUSION

The Third Circuit's interlocutory order remanding the case for a determination of Mr. Michael's competence is not in conflict with any decision of this Court, of any state supreme court, or of any other circuit court of appeals. The Third Circuit is in the best position to manage its own docket and decide how to determine whether the appeal should go forward or be dismissed. This case is not now (if it ever will be) ripe for this Court's review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 22, 2007